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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

ALLAN BAKKE, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

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BRIEF OF THE NATIONAL MEDICAL ASSOCIATION, INC. THE NATIONAL BAR ASSOCIATION, INC. AND THE NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION AMICI CURIAE

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BRIEF OF
THE NATIONAL MEDICAL ASSOCIATION, INC.
THE NATIONAL BAR ASSOCIATION, INC.
AND
THE NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION
AMICI CURIAE

OPNIONS BELOW

The opinion of the California Court is reported at 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976). The order denying the University's petition for rehearing is not reported. The modification to the California Supreme Court's opinion prompted by the University's rehearing petition is reported at 18 Cal.3d 252b. The opinion of the state trial court, the trial court's "addendum to notice of intended decision," its findings of fact and conclusions of law and its judgment are not reported. These several opinions and actions of the California Courts are reprinted

as Appendices A through G to the Petition for Writ of Certiorari filed herein. The case proceeded directly from the trial court to the highest state court. Accordingly, there is no intermediate appellate court opinion.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1257 (3). Certiorari was granted on 22 February 1977.

QUESTIONS PRESENTED

Is it constitutionally permissible for a state medical school to utilize as criteria for selection, among qualified applicants to study medicine, factors such as the applicant's race, sex, work experience, prior military experience and other background for the purpose of increasing the access of minority students to medical education, improving the quality of the medical education of all its students, and producing graduates best calculated to improve and extend medical care to the State's inhabitants?

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSENT TO FILING

This Amici Curiae brief is being filed with the consent of all parties to the proceeding.

INTEREST OF THE AMICI CURIAE

The National Medical Association is a professional organization which represents the 8,000 American Physicians who are Black. The objectives of the National

Medical Association are to raise the standards of the medical profession and of medical education; to stimulate favorable relationships among all physicians; to nurture the growth and diffusion of medical knowledge; to sponsor the education of the public concerning all matters affecting the public health; to sponsor the enactment of just medical laws; and to eliminate religious and racial discrimination and segregation from American medical institutions.

The Association was formed in 1895 in Atlanta, Georgia, and incorporated in St. Louis, Missouri, August 31, 1923, under the laws of the State of New Jersey.

The Association maintains national headquarters at 1720 Massachusetts Avenue, N.W., Washington, D.C. (20036). It publishes a monthly scientific journal entitled *The Journal of the National Medical Association* and an all-membership news and features publication entitled *NMA News*. Its president is Dr. Arthur H. Coleman, San Francisco, California.

The National Bar Association is a professional membership organization which represents the more than 7,000 Black attorneys in the United States.

The National Bar Association was incorporated under the laws of the State of Iowa in 1925, over two decades before Black attorneys were allowed membership in the American Bar Association, and at a time when very few law schools in the United States admitted Black enrollees.

The Articles of Incorporation of the NBA state the objectives of the Association as being, in part, to:

> "[A]dvance the science of jurisprudence, uphold the honor of the legal profession, . . . and protect the civil and political rights of all citizens of the several states and of the United States."

One of the primary reasons for the birth of the Association in 1925, was to achieve equalization of opportunities

for minorities in the legal profession in order to further the goal of equal justice for all. In its fifty-two years, the Association has seen the number of Black attorneys in the United States grow from a fraction of a percentage point of the total to almost 2% today. However, Blacks (as well as other minorities and women), are still grossly underrepresented in the legal profession—and, for that matter, in the medical and other professions, as the text of the *Bakke* case indicates.

Thus far, the most effective methods proven to ameliorate that condition, and certainly the most critical factors in the doubling of the number of Black attorneys in America in the past decade, have been the affirmative action programs initiated by a number of law schools since around 1968. This was also the year that the National Bar Association, in partnership with the ABA, the American Association of Law Schools and the Law School Admissions Council, founded the Council on Legal Educational Opportunity, whose stated goal was to increase the enrollment of minority students in American law schools.

The legal profession has perhaps been more significant than any other in shaping the fortunes and destinies of the American people, majority and minority alike. It is common knowledge that until a few years ago, all but a minuscule number of Blacks were excluded from the profession. In fact, as recently as 1950, Blacks were forced to invoke the powers of the U.S. Supreme Court in order to gain admission to tax-supported law schools in parts of this country. Although the situation is somewhat better today, it would not be inaccurate to state that, at our present rate of progress, we are still many years away from true equality in our justice system and proportionate representation of Blacks in the legal profession.

The Association maintains a National Headquarters at 1900 L Street, N.W., Washington, D.C. (20036). Its president is Carl J. Character, Cleveland, Ohio.

The National Association for Equal Opportunity in Higher Education, 2001 S Street, NW., Washington, D.C. (20009), organized October 7, 1969, is a voluntarily independent association of Presidents of 107 predominantly Negro Colleges and Universities.

Its Board of Directors and officers are as follows:

President—Dr. Charles A. Lyons, Jr., Fayetteville State University, North Carolina.

Vice President—Dr. Luther H. Foster, Tuskegee Institute, Alabama.

Vice President—Dr. Samuel L. Myers, Bowie State College, Maryland.

Vice President—Dr. J. Louis Stokes, Utica Junior College, Mississippi.

Secretary—Dr. Milton K. Curry, Jr., Bishop College, Texas.

Treasurer—Dr. M. Maceo Nance, Jr., South Carolina State College, South Carolina.

Immediate Past President—Dr. Herman R. Branson, Lincoln University, Pennsylvania

Dr. Ernest A. Boykins, Mississippi Valley State University, Mississippi.

Dr. Oswald P. Bronson, Bethune-Cookman College, Florida.

Dr. Samuel D. Cook, Dillard University, Louisiana.

Dr. Norman Francis, Xavier University, Louisiana

Dr. Charles L. Hayes, Albany State College, Georgia.

Dr. Frederick S. Humphries, Tennessee State University, Tennessee.

Dr. Allix B. James, Virginia Union University, Virginia.

Dr. Luna I. Mishoe, Delaware State College, Delaware.

Dr. Lionel H. Newsom, Central State University, Ohio.

Dr. John A. Peoples, Jr, Jackson State University, Mississippi.

Dr. Henry Ponder, Benedict College, South Carolina.

Dr. Prezell R. Robinson, Saint Augustine's College, North Carolina.

Dr. James A. Russell, Jr., Saint Paul's College, Virginia.

Dr. Julius S. Scott, Jr., Paine College, Georgia.

Executive Secretary—Miles Mark Fisher, IV.[1]

This Association was organized to articulate the need for higher education systems not limited as to quantity or quality by race, income, or previous educational limitations nor other determinants not based on abiilty.

This is an association of those Colleges and Universities which are not only committed to this ultimate goal, but are now fully committed in terms of their resources, human and financial, to achieving this goal. The Association proposed, through the collective efforts of its membership, to promote the widest possible sensitivity to the complex factors involved and the institutional commitment required to create successful higher education programs for students from groups buffered by the racism, exploitation, and neglect of the economic, educational and social institutions of America.

Thus, this Association has a unique interest in this litigation.

These historically Black institutions without exception have, from the very beginning of their existence, been open

[1] See Appendix A, which list the Presidents of the traditionally Black Institutions of Higher Education, which constitute the membership of the National Association for Equal Opportunity in Higher Education.

to all races, sex, colors, creeds, and they have always collectively offered employment and other incidental privileges to all who passed through their doors, except where State law prohibited the same. They have been menders, healers for wounded minds and restless souls. They have produced sterling talent which has benefited this Republic beyond measure of calculation—not only in material contribution, but intellectual, cultural, moral and spiritual offerings. In a number of instances, Black institutions have been more profoundly representative of the American Ethic than the larger, more affluent, schools of Higher Education in this country. Indeed, they were founded and remain today as "Affirmative Action" programs committed to a public offering of education attainment.

These historically Black Institutions of Higher Education have welcomed, nurtured and developed the progeny of the slave system.

The institutions whose views are presented in this Amici Brief, have backgrounds of perpetual service to all people, with missions and goals to make educational opportunities a reality rather than an empty expectation. These institutions believe that other institutions with ignominious histories of selective exclusion of Blacks, and other minorities ought to be permitted, and even more so commanded to adapt and promote "affirmative action" programs to achieve minority access to higher education in enrollment, employment and over all participation where these institutions have labored so long in the vineyards alone desperately seeking to overcome the disablements visited upon the principal victims of a racist society.

STATEMENT OF THE CASE

Allan Bakke, a Caucasian, was denied admission to the medical school of the University of California at Davis, a publicly financed institution, for the academic years commencing September 1973 and 1974. In neither year was he

accepted by any other medical school. Bakke believed his rejections were due to the acceptance of less qualified minority applicants admitted under the University's special admissions program. This program separately considered the admissions credentials of disadvantaged applicants from particular racial groups.

A. The Lower Court Decision

Bakke brought suit against the Board of Regents in Yolo County Superior Court. He argued that the minority preference program racially discriminated against him as a white applicant, and, therefore was violative of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, the privileges and immunities clause of the California constitution, and Title VI of the Civil Rights Act of 1964. He sought a mandatory injunction and declaratory relief ordering his admission.

The University contended that Bakke would have been rejected whether or not it operated a special admissions program. It filed a cross-complaint for declaratory relief, however, to enable the trial court to rule independently on the constitutionality of its minority admissions policy, irrespective of Bakke's particular claim.

Regarding this cross-complaint, the court held that the special admissions program violated the Fourteenth Amendment of the U. S. Constitution, the California constitution, and the Civil Rights Act of 1964. It rejected, however, Bakke's request for an injunction, finding that he had not proven he would have secured admission in either year despite the special program. Although both parties appealed to the Court of Appeals, the Supreme Court of California assumed control of the case due to the important questions presented.

B. The California Supreme Court Decision

The Supreme Court affirmed the trial court's conclusion that the minority special admissions program was unconstitutional. It reasoned that the racial classifications used by the program denied non-minority applicants admission to a program they would have enjoyed but for their race. Accordingly, these racial classifications were considered "suspect," and, therefore, subject to a "strict scrutiny" equal protection standard of review. In applying this standard, the court assumed, *arguendo,* that most of the program's goals established a "compelling" state interest. Nevertheless, the court held the program invalid because the University had failed to prove that its objectives could not be by means less burdensome to the majority's rights.

Concerning Bakke's prayer for injunctive relief, the Supreme Court remanded the question to the trial court. Since Bakke established that the University had discriminated against him, the University, on remand, had the burden of proving that he would have been denied admission without the operation of the constitutional impermissible special minority admissions program. Amici has adopted the statement of the case from Comment on Bakke at 12 New England Law Rev. 719 (1977).

ARGUMENT

I. THE STATE OF CALIFORNIA'S "AFFIRMATIVE ACTION" PROGRAM IN EDUCATION AND ITS CONSTITUENT ADMISSIONS PROGRAM AT THE DAVIS MEDICAL SCHOOL ARE PERMISSIBLE UNDER THE FOURTEENTH AMENDMENT.

State policy in California, as reflected in (a) judicial opinions and (b) legislative action, found racial discrimination and exclusion rampant in the state's experience and directed and mandated programmatic activity for the purpose of bringing about greater access and educational opportunities for racial minorities in the state.

California, taking its cue from the other states in the Union perpetuated its badges of slavery. This is illustrated by an examination of the following areas:

A. Miscegenation

California's miscegenation statute was not declared unconstitutional until 1948. *Perez* v. *Sharp*, 32 Cal., 2d 711, 198 P.2d 17 (1948), (Miscegenation was a badge listed by Justice Taney, in *Dred Scott* v. *Sanford*, 19 How. 393, 403, 407, (1856), as evidence of the inability of the people of African descent to become members of the body politic). California Civil Code, 1949 provided: Section 60. [Marriage of white and other persons.] All marriage of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void. [Enacted 1872; Amended by Stats. 1905, p. 554; Stats. 1933, p. 561.]

In *Perez* v. *Sharp, supra,* it was held that Sections 60 and 69 of the Civil Code were unconstitutional, contrary to the First and Fourteenth Amendment of the Constitution of the United States. See Murray, *States Laws on Race and Color,* p. 47 (1955) (Supp.).

B. Voting

In a report by the United States Commission on Civil Rights; *The Voting Rights Act: Ten Years After,* January, 1975, substantial racial discrimination against Blacks and other minorities, in voting in California was documented. For example, two (2) counties in California—Monterey and Yuba—have been brought under the special coverage of the Voting Rights Act Amendments of 1970. This was a result of Congress amending the trigger provisions of this Act to refer to the 1967 election and the 1968 election.

Also, in *Castro* v. *California,* 466 P.2d 244, 258, 85 Cal. Rptr. 20 (1970). The California Supreme Court found that the state's English-language literacy requirements to be a violation of the equal protection clause of the Fourteenth Amendment. The court, however, did not eliminate the requirement of literacy altogether, or order the development of a "bilingual electoral apparatus".

Subsequently, the California State Legislature enacted legislation which required county officials to make reasonable efforts to recruit bilingual registrars and election officials in precincts with three (3) percent or more Non-English speaking voting age population. Cal. Election Code §§ 201,1611 (West Supp. 1974).

In addition, California now requires the posting of a Spanish-language ballot, with instructions, that also must be provided to voters on request for their use as they vote. Cal. Election Code § 14201.5 (West Supp. 1974). See *Ten Years After, supra,* at 24-25.

Although the impact of the Voting Rights Act has been the greatest in the southern states, discrimination in voting is not limited to the south. The Commission on Civil Rights has emphasized:

> "[T]he problems encountered by Spanish speaking persons and native Americans in covered jurisdictions are not dissimilar from those encountered by Southern blacks. . . ." *Id.* at 16.

California law now requires county officials to recruit bilingual poll watchers. Cal. Election Code § 1611 (West Supp. 1974). Also, California has recently passed legislation that allows Spanish to be spoken at the polls. *Id.* at 165.

C. Housing

Racial segregation and discrimination in the area of land use and occupation, has a shameful history in the State of California, sanctioned by the legislature and protected by the judiciary.

The judicial protection is evidenced in *Los Angeles Investment Co.* v. *Gary,* 181 Cal. 680, 186 P.596 (1919), where the California Supreme Court held that the Fourteenth Amendment proscription of discrimination against Blacks did not apply to contracts between individuals. The court concluded that a provision in a deed which prohibits the occupation

of property by anyone not of the white race, *is a valid condition* and not a restraint upon alienation. The proposition that racially discriminatory covenants restraining the use or occupancy of land was continuously upheld by the California courts in *Wayt* v. *Patee,* 205 Cal. 46, 269 P.660 (1928); *Forest Lawn Association* v. *de Jarnette,* 250 P.581, 79 Cal. App. 601 (1926); *Fairchild* v. *Raines,* 151 P.2d 260; 24 Adv. Cal. 812 (1944).

A condition in a deed forbidding the renting or sale of the land to persons other than of the Caucasian race, and occupation by persons other than of that race was held not to violate the equal protection clause of the Fourteenth Amendment, *Home Teleph. and Teleg. Co.* v. *Los Angeles,* 227 U.S. 278, (1913); *Firth* v. *Marowick,* 116 P.729 (1911), rev'd. 227 U.S. 278 (1913).

The aforementioned cases indicate a pattern of *de jure* segregation in housing in the early 1900's.

In *Shelly* v. *Kraemer*, 334 U.S. 1 (1948), the United States Supreme Court held that it was in violation of the equal protection clause of the Fourteenth Amendment for a state court to enforce private agreements to exclude persons of a designated race or color from the use or occupancy of real estate for residential purposes. See Ming, "Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases," 16 *U. Chi. L. Rev.* 203 (1949). Despite the mandate in *Shelly, supra,* outlawing state action in maintaining discriminatory housing patterns, the state of California failed to act affirmatively to cure its shameful past history. For, in *Banks* v. *Housing Authority of the City and County of San Francisco,* 260 P.2d 668, 120 Cal. App. 2d 1 (1953) at issue was policy implemented by the housing authority, that allocated dwelling units to racial groups based on their proportional needs and neighbor hood racial patterns. The state appellate court found that the policy was tantamount to the executive branch of the government enforcing restrictive covenants which the judicial branch is prohibited from doing by the Fourteenth Amendment. The decision further noted that the housing authority was exercising state action by preservation, perpetuation and enforcement of a neighborhood racial pattern whenever a formal decision was made to locate and construct a housing project.

In *Reitman* v. *Mulkey,* 413 P.2d 825 (1964) affirmed 387 U.S. 369 (1967), the Supreme Court of California considered discrimination practiced by defendant who refused to rent unoccupied apartments to plaintiffs solely on the ground that they were Negroes. United States Supreme Court held that the article of the California constitution prohibiting the state from denying rights of any person to decline to sell, lease or rent his real property to such person as based on his absolute discretion, constituted affirmative action on the part of the state to change its existing law from a situation where discrimination was legally restricted, to one in which it was not. Such discrimination denied plaintiffs and those similarly situated equal protection of laws as guaranteed by the Fourteenth Amendment to the Federal Constitution. The article was held unconstitutional.

The article referred to was Proposition Fourteen [Formerly ART. I § 26] which was incorporated into the California Constitution provided as follows:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion chooses."

It was not until 1959 that the State Legislature took the first steps toward eliminating racial discrimination in housing. The Unruh Civil Rights Act (Civ. Code, §§ 51-52)

prohibited discrimination on grounds of "race, color, religion, ancestry, or natural origin" by "business establishments of every kind". During the same session the Legislature passed the Hawkins Act (formerly Health & Safety Code, §§ 35700-35741) that prohibited racial discrimination in public assisted housing accommodations.

In 1961, Civ. Code, § 53 and Civ Code, § 782 were passed to discourage segregated housing by enacting proscriptions aginst discriminatory restrictive covenants effecting real property interests and racially restrictive conditions in deeds of real property, respectively.

Finally in 1963 the State Legislature superseded the Hawkins Act by passing the Rumford Fair Housing Act (Health & Safety Code, §§ 35700-35744).

The spirit of the recent affirmative legislation (supra) to eliminate racial segregation in California was curtailed with the enactment of Proposition Fourteen. In short, Proposition Fourteen generally nullified both the Rumford and Unruh Acts as they applied to the housing market and was a form of *de jure* discrimination.

The existence of discrimination in the State of California has also been found to exist in studies and reports conducted by various commissions. For example, in The Fifty States Report, submitted to the Commission on Civil Rights by the State Advisory Committees, 1961, pp. 43-44, the California State Advisory Committee found that

> "[t]he State of California has a large and increasing Negro population. These people live mainly in segregated pattern, in the major urban center of the state. In most cases, Negro housing areas are considerably less attractive than housing in other areas. . . . There still exists the deep fear that property value will experience a severe drop when Negro families enter a previously all-white neighborhood. In addition, this fear seems to be shared by businessmen in the real estate industry who reflect in business attitudes and practices this premise of falling values when integration occurs." *Id.* at 44.

The Committee found that the reasons for segregation are twofold: (1) The real estate industry in California whose leaders still continue to support and advance the concept of segregation in their business and (2) that the concentration of Negro families into certain specified areas within California cities which is augmented, rather than alieviated, by urban renewal projects. *Ibid.*

It is the unanimous view of the Committee that in California, minority housing is largely a Negro problem. However, Oriental-American and Mexican-American also populate ethnic areas within California cities; moreover, there is a far greater degree of housing mobility for Oriental and Mexican-Americans in California than exists for Negroes. *Id* at 48.

This committee finally found that the Negro housing problem is widespread. Negroes encounter discrimination not only where houses in subdivision and in white neighborhoods are concerned, but also in regard to trailer parks and motels. *Ibid.*

All of the authorities assess racial segregation and discrimination in land use as a direct and summary factor in producing segregation and racial isolation in education. See *Jackson* v. *Pasadena City School District*, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

D. Education

All of the authorities assess racial segregation and discrimination in land use as a direct and summary factor in producing segregation and racial isolation in education. *Ibid.*

In *Jackson, supra*, the State Supreme Court found that school zones were racially segregated on a fixed neighbor-

hood basis and thereby ordered the School Board to allow the plaintiff to transfer to another school. The court held that:

> "So long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have."

That court further noted that:

> "The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause." *Id* at 609-610.

School authorities were directed to consider the degree of racial imbalance and "define the extent to which it affects the opportunity for education".

Careful reading of this case provides the impetus for school authorities to accept the responsibility for affirmatively eradicating prolonged segregation in schools regardless of its cause.

Having viewed *Jackson, supra,* it is necessary to reflect and determine whether prior to 1963, Blacks and other racial minorities living in the state of California had experienced prior racial prejudice that would justify present affirmative action as a remedy to segregated educational systems.

Supporting the proposition of preserving racially separate schools was *Ward* v. *Flood,* 48 Cal. 36, 17 Am. Rep. 405 (1874). Here the state Supreme Court refused to compel the admission of a black child to a school established for white children because there was provided by statute a school for colored children. The pertinent part of that statute entitled, School Law of California, April 4, 1870 (Laws 1869-70, p. 838), provided:

> "Section 53. Every school, unless otherwise provided by special law, shall be open for the admission of all white children between five and twenty-one years of age residing in that school district, and the Board of Education shall have power to admit adults and children not residing in the district, whenever good reasons exist for such exceptions.
>
> Section 56. The education of children of African descent, and Indian children, shall be provided for in separate schools. Upon the written application of at least ten such children to any Board of Trustees, or Board of Education, a separate school shall be established for the education of such children; and the education of a less number may be provided for by the Trustees, in separate schools, or in any other manner."

The foregoing statute evidences a history of *de jure* school segregation in California.

Racial school segregation had a further legislative basis in California, as affecting other minorities. These laws were not declared unconstitutional until as late as the 1940's. *Mendez* v. *Westminister School District of Orange County,* 64 F. Supp. 554 (1946), affirmed 161 F.2d 724; see also, *A Generation Deprived: Los Angeles School Desegregation, A Report of the United States Commission On Civil Rights,* May 1977.

In another case decided at the federal level, *Wong Him* v. *Callahan,* 119 F. 381 (1902), the constitutionality of separate schools was affirmed. Involved was Political Code of the State of California § 1662, which provided school authorities the power to establish separate schools for children of Chinese descent. The statute further provided "when such separate schools are established, Chinese or Mongolian children must not be admitted into any other schools". The court here held that where Chinese schools are offered the same advantages as other schools, the

operation of the law is not violative of the Fourteenth Amendment.

Racial segregation and discrimination in public school education in California is largely uncorrected today. See, *A Generation Deprived: Los Angeles School Desegregation, A Report of the United States Commission on Civil Rights, May 1977* and *Fulfilling the Letter and Spirit of the Law: Desegregation of the Nation's Public Schools, A Report of the United States Commission on Civil Rights,* August 1976.

In *Lau* v. *Nichols,* 414 U.S. 563 (1974), the court held that the failure of the San Francisco school system to provide English language instruction to approximately 1,800 students of Chinese ancestry, who do not speak English, or to provide them with other adequate instructional procedures, denies them a meaningful opportunity to participate in the public educational program, and thus violated § 601 of the Civil Rights Act of 1964, which bans discrimination based "on the ground of race, color, or national origin", in any program or activity receiving Federal Financial Assistance, and implementing the regulations of the Department of Health, Education and Welfare.

The San Francisco, California, school system began to integrate in 1971 as a result of a federal court decree, [339 F.Supp. 1315 (1971)], *Lee* v. *Johnson,* 404 U.S. 1215 (1971), but a report adopted by the Human Rights Commission of San Francisco, and submitted to the court by respondents after oral argument, shows that, as of April, 1973, there still existed patterns of discrimination.

In *Serrano* v. *Priest,* 96 Cal. Rptr. 601 (1971), the Supreme Court of Los Angeles County, held that public school financing systems which rely heavily on local property taxes and cause substantial disparities among individual school districts in the amount of revenue available per pupil for the district's educational grants, visit invidously discriminate against the poor and violate the equal protection clause of the Fourteenth Amendment.

The judgment was reversed and the case remanded. The right to an education in public schools is a fundamental interest which cannot be conditioned on wealth. But see, *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973).

In *Lee* v. *Johnson, supra,* the District Court found that a desegregation plan offered by the School Board was within the established legal bounds. But this Court stated:

> "Historically, California statutorily provided for the establishment of separate schools for children of Chinese ancestry. That was the classic case of *de jure* segregation involved in *Brown* v. *Board of Education,* 347 U.S. 483, relief ordered, 349 U.S. 294. Schools once segregated by state action must be desegregated by state action, at least until the force of the earlier segregation policy has been dissipated. 'The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.' *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 15."

Applicants request for stay of District Court's order was denied on reassigning pupils of Chinese ancestry to other San Francisco public schools. By refusing to stay, the court allowed the school board's plan to desegregate.

The 1967 report of the United States Commission On Civil Rights, *Racial Isolation in the Public Schools,*[2] found that the impact of segregation in educational institutions is reflected in the difference in educational achievement scores accomplished in segregated and integrated schools.

The report further notes that blacks are greatly affected by racial isolation in their respective school sys-

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[2] See Appendix B.

tems. It creates a lasting stigma, which influences future isolation throughout their lives.

The Commission offered the following explanation:

> "The environment of schools with a substantial majority of Negro students offers serious obstacles to learning. The schools are stigmatized as inferior in the community. The academic performance of their classmates is usually characterized by continuing difculty. The children often have doubts about their chances of succeeding in a predominately white society and they typically are in school with other students who have similar doubts . . ." *Id.* at 106.

The Commission went on to note that "racial isolation fosters attitudes and behavior that perpetuate isolation in other important areas of American life".

The 1963 Report of the United States Commission on Civil Rights, *State Policies Against Racial Imbalance,* noted the fact that California, in 1962, took a similar position like that of most states toward affirmative action and decentralization of its segregated school systems.

The California State Board of Education adopted a policy that segregation in the schools "even where physical facilities and other tangible factors are equal, inevitably results in lawful discrimination".

The 1963 report further noted that:

> "We fully realize that there are many social and economic forces at play which tend to facilitate de facto racial segregation, over which no control, but in all areas under our control or subject to our influence, the policy of elimination of existing segregation and curbing any tendency toward its growth must be given serious and thoughtful consideration by all persons involved at all levels.
>
> Wherever and whenever feasible, preference shall be given to those programs which will tend toward conformity with the view herein expressed." *Id.* at 60.

The Board amended its original policy statement in 1962 by adopting an amendment which provided that it would refrain from establishing specific school areas for its students to attend, because this process facilitated segregated schools.

In *Crawford* v. *Board of Education of the City of Los Angeles,* 551 P. 2d 28, 35, 130 Cal. Rptr. 724 (1976) the California Supreme Court emphatically clarified two fundamental principles in the school desegregation process: (1) the state law authorizes the local California school boards to accept the "affirmative duty" to alleviate school segregation, whether *de facto* or *de jure;* and (2) the proper role of the Court in a court-ordered desegregation process is to ensure that the school board "initiates and implements" reasonable measures to effectuate progress in alleviating segregation and its offensive consequences. The Court also made reference to its holding in *San Francisco Unified School District* v. *Johnson,* 3 Cal. 3d. 937, 479 P.2d 669 (1971) in noting the serious harm inflicted on minority children by segregated school systems and stated: "[I]t is the presence of racial isolation, not its legal underpinnings, that creates unequal education".

A Report of the United States Commission on Civil Rights entitled *"A Generation Deprived: Los Angeles School Desegregation",* (May, 1977), p. 216 concluded that today the mandate of *Crawford, supra,* to remedy school desegregation and its harmful effects has not been achieved. That Report examined the desegregation plan submitted to Judge Egly of the Superior Court of the County of Los Angeles on March 18, 1977, and found the plan *"constitutionally deficient under California constitutional standards. The plan neither eliminates nor begins to eliminate segregated schools or the harm which has resulted from the segregated school system."* (Emphasis in original)

In reflecting on the past history of segregated schools in Los Angeles, the Report further states:

> "Where, as in this case, a school board has built a record of dilatory conduct, resistance to its constitutional duty, and apparent bad faith, that board has the additional burden of demonstrating its commitment to fulfill both the letter and spirit of the law. The school board plan presented to the court in March 1977 gives no indication of any such commitment." *Id.* at 217.

In 1976, the Commission on Civil Rights examined the desegregation effort of Berkeley, California in its report, "*Fulfilling the Letter and Spirit of the Law*" (August, 1976) pp. 50-54. The Report cites the city of Berkeley as one of the first Northern school districts to desegregate voluntarily and commended the total community effort in the successful implementation of the 1964 and 1968 desegregation plans. Berkeley is currently implementing its 1972 plan for desegregation. The fact that the city of Berkeley has had three desegregation plans within an eight-year period, evidences the existence of segregated schools in the past and the continued lingering effects.

The 1976 Report, in addition, makes reference to the existence of segregated schools in Santa Barbara, California. The result of such and by state recommendations, the Santa Barbara School District developed and began to implement a three phase desegregation plan in 1972. As of the date of the Report, only two schools had been involved in the desegregation process and only the first phase of the plan had been implemented.

The focal issue presented here is whether the State of California with a system of education from the public elementary schools through postsecondary education, after finding past racial segregation and discrimination in the total system, may institute affirmative action programs, including the one in issue at the Davis Medical School, to remedy the past effects of both *de jure* and

de facto racial segregation and discrimination by promoting and developing equal access of racial minorities to the benefits and rewards of the California educational system. Hefferlin and others have stated:

> "Commentators about America have noted that the genius of our society and of our educational system can be summarized in one word: emancipation—emancipation from ignorance, emancipation from limitations, emancipation from the chance restrictions of environment and fortune. In many ways, California as a state has exemplified this goal. Its development of its system of University, State University and College, community college, and adult school resources has been the envy of the nation if not the world. It ranks among the leading states in educating its youth and young people."

Hefferlin, Peterson and Roelfs, Prepared for the California Legislature, September 1975, Postsecondary Alternatives Meeting, California's Educational Needs A Feasibility Study, First Technical Report Part One, California's Need For Postsecondary Alternatives.

The University of California, Davis, Medical School, is a part of the state supported system of education in California. The state of California through its legislature and courts, found the California system of public education to be racially and otherwise discriminatory. The state directed its constituents to evolve plans and to work toward the elimination of racial exclusion in the educational system by providing for greater access to state afforded and supported educational opportunities.

Though the record and arguments by the parties in this case do not refer to certain public documents and reports by the state of California and the United States Civil Rights Commission, the California State Courts could have taken judicial notice of these several reports, (West Annotated California Codes, Evidence Code, § 451; *Allen*

v. *Superior Court In and For San Diego County,* 340 P.2d 1030, 171 C.A.2d 444 (1959); Thomas Kongsgaard, *Judicial Notice and the California Evidence Code* (1966), and likewise this Court may take judicial notice of these reports. *Boynton* v. *Virginia,* 364 U.S. 454, 467, n.5 (1960); *Brown* v. *Board of Education,* 347 U.S. 483, 494 n.11 (1954); 349 U.S. 294 (1955).

Ironically, John Vascancellos, Chairman, Assembly Education Subcommittee On Postsecondary Education, California Legislature, The Bakke Decision, Disadvantaged Graduate Students, Transcript and Statements, Sacramento, California, March 2, 1977, pp. 94-95 has observed:

> "For example, ACR 150 and 151 were passed by us three years ago. They urged you to adopt flexible admissions and then they indicated a state policy for the Legislature about not enough minorities in the schools, and asked you to address that affirmatively. I could tell you that your counsel didn't use that as evidence in the case, to convince the court that there was a compelling interest of the State Legislature. To me, that is unconscionable, not to help use that for your own case, and there are a dozen more that I have written down here that leaves me utterly unconvinced that the people who have handled the case so far recognized the subtleties of the case, or have their hearts in the right place."

Equal Educational Opportunity In California Postsecondary Education: Part I, A Report Prepared by the California Postsecondary Education Commission, Commission Report 76-6, April 1976, pp. 1-3 states:

> "I. Background and Summary
>
> Equal educational opportunity for all California citizens has been a goal of our public institutions since at least 1965. In the past ten years, considerable progress has been made toward this goal, as minority enrollments have approximately doubled as a percentage of the total student body.

During the same period, the financial commitment to achieving equality of educational opportunity also has increased. The Board of Regents, for example, has contributed $40 million from its own resources for the University of California's Educational Opportunity Program. The California State University and Colleges will expend over $6 million in State Funds in the current year for its Educational Opportunity Program. The California Community Colleges have an Extended Opportunity Programs and Services program (EOPS) of equivalent size. Despite these significant efforts, however, equal educational opportunity remains a goal and not a reality in California post-secondary education.

Recognizing the need for increased efforts by public institutions to overcome the underrepresentation of women, ethnic minorities, and low-income persons in their student bodies, the Legislature adopted Assembly Concurrent Resolution 151 (1974). This resolution requested the Regents of the University of California, the Trustees of the California State University and Colleges, and the Governors of the California Community Colleges:

> To prepare a plan that will provide for addressing and overcoming, by 1980, ethnic, economic, and sexual underrepresentation in the make-up of the student bodies of institutions of public higher education as compared to the general ethnic, economic, and sexual composition of recent California high school graduates.

These plans were to be submitted to the California Postsecondary Education Commission by July 1, 1975, and the Commission in turn was to 'integrate and transmit the plans to the Legislature with its comments'.

In addition, ACR 151 requested the three public segments to report annually to the Commission on their progress toward the 1980 goal, with specific discussion of obstacles to the implementation of a statewide plan. These reports are to be integrated and transmitted to the Legislature by the Commission, together with its evaluations and recommendations.

The Legislature also identified four methods for responding to the problem of underrepresentation:

> (a) affirmative efforts to search out and contact qualified students;
>
> (b) experimentation to discover alternative means of evaluating student potential;
>
> (c) augmented student financial assistance programs; and
>
> (d) improve counseling for disadvantaged students.

An analysis of the segmental reports submitted to the Commission in response to ACR 151 leads to the following conclusions:

> The reports are not adequate in meeting the Legislative request that the segment develop a coherent plan to address and overcome the problem of underrepresentation. While the reports vary considerably in the degree of specific and comprehensive analysis presented, none reveals a thoroughly developed, detailed plan for student affirmative action.
>
> Compared to the composition of recent California high school graduates, Black and Spanish-surnamed students are under-represented in public postsecondary education. Moreover, during the past two years, the degree of underrepresentation apparently has increased rather than decreased. While women are also under-represented, this occurs more frequently in the graduate programs.
>
> While increased financial assistance through the several student aid programs is probably needed, greater emphasis must be placed on (1) recruitment programs to increase the eligibility pool of the underrepresented groups, and (2) on student support services to promote successful educational experiences for those who gain access to public postsecondary education.
>
> Efforts by the segments to achieve the goal of equal educational opportunity would be enhanced by a clearer long-range commitment on the part of the Legislature and the Governor to support a coherent financial program requisite for an effective student affirmative action plan. While ACR 151 states 'it is the intent of the Legislature to commit the resources to implement this policy.' State government as a whole has done demonstrated this intent."

Given these conclusions, it is clear that the institutions of public postsecondary education are only in the beginning stage of developing a student affirmative action program. Accordingly, this Report should be considered the first of two dealing with equal educational opportunity in post secondary education. This First Report describes the current situation in the student affirmative action programs of the public segments and presents initial recommendations and guidelines for the development of a comprehensive statewide plan for student affirmative action. The Second Report, to be developed through cooperative efforts by the Commission and the three public segments, will present this statewide plan and will include a detailed discussion of the activities and costs of current and proposed programs. The Commission will play a leadership role in developing a statewide plan coordinating segmental activities. The Second Report was submitted to the Legislature in January 1977.

The significance of the college degree is strongly felt and adamantly expressed by most Californians; so much so, that its attainment is believed to provide an upward social and economic mobility resulting in personal growth and cognitive development. This persuasion is now being challenged due to the changing of time, the development of numerous critiques of higher education, and the growing number of unemployed college graduates. Notwithstanding this somewhat recent attack, college attendance yields very real, personal and social benefits for many, particularly minorities

and poor persons. However, college is not an option open for many high school graduates. In other words, it is needless to say that access to college, for many persons, remains unequal. "Nationally, if your family's annual income is $15,000 you are four times more likely to attend college than if your family's income is $3,000. If you are very poor and black, your chances of entering college are one-seventh that of students from high income white families. Underrepresentation of ethnic minorities continues, particularly at four-colleges and universities." *Unequal Access to College, Post Secondary Opportunities and Choices of High School Graduates,* Staff Report, Assembly Permanent Subcommittee on Post Secondary Education, California Legislature 1, 1975.

The Legislature, in adopting Assembly Concurrent Resolution 151 (1974), took cognizance of the fact that additional efforts by colleges and universities would be necessary to overcome the large degree of underrepresentation of ethnic minorities and poor, alike.

In effect, ACR 151 sets forth the requirement that the three public segments of higher education, i.e., the community colleges, the State University and Colleges, and the University of California, must develop certain strategy in order to alleviate the present situation of underrepresentation of minority students and students from low income families by 1980.

In analyzing the data considered, the findings are as follows:

> "Substantial inequality of post-high school *opportunities* exists between graduates of high schools serving low income areas and graduates of high schools serving high income areas. The rates of eligibility to enter the University of California and the State University and Colleges are three times greater for graduates of high income schools than for graduates of low income schools (Table 9 and 12). UC and CSUC eligibility rates for Spanish surname and black graduates

> are one-third the eligibility rates for whites (Tables 10 and 13). (This finding is compounded by dropout rates in sampled low income high schools averaging 39 percent, compared to 13 percent in high income schools—Table 7.)
>
> Actual post-high school *choices* of graduates reveal similar inequalities. Graduates of high schools in high income areas are four times as likely to enter the University of California and twice as likely to attend the State University and Colleges as are low income graduates (Table 15). Rates of entrance to community colleges and independent colleges and universities are very similar, regardless of differences in family incomes: Only two and four percent of all Spanish surname and black graduates, respectively, entered UC, compared to an entrance rate of 14 percent for white graduates (Table 16).
>
> Specific inequities emerge after combining information about opportunities and choices: Significantly greater numbers of UC and CSUC—eligible low income graduates are not entering college, than eligible high income graduates. And many high achieving low income graduates are ineligible to attend UC and/or CSUC due only to minor course or scholarship deficiences. The substantial number of UC and/or CSUC eligible, low income graduates entering community colleges provides a potentially larger number of students eligible to later transfer to UC and/or CSUC (Tables 17 through 20).
>
> Given unmet financial need remains substantial, increasing only student aid appropriations will not significantly increase the numbers of low income and minority college students. Governmental and institutional strategies for overcoming access inequalities must also focus on:
>
> —improving instructional programs in low income high schools to increase achievement levels;
>
> —improving information available to high school students about postsecondary opportunities and student aid;
>
> —increasing flexibility of admission requirements;

> —expan[ding] student support services (e.g., tutoring and counseling) for low income and minority students who enter college. . . .
>
> Four times as many graduates of high income schools actually enter the University of California as graduates from low income schools. Seventeen percent of high income graduates choose to enter the State University and Colleges, compared to only eight percent of graduates from low income schools. While just under one-half of graduates from high income schools enter a four-year college, only 21 percent of low income graduates do so. There seems to be surprising equality of opportunity for graduates choosing to enter a private college or university: Private college entrance rates for graduates from high, middle, and low income schools are roughly equal at ten, seven, and eight percent. Entrance rates to community colleges are also approximately equal for graduates of all three income groups." *Id.* at 2, 3, 17.

Due to the great disparity found in tuition levels, ranging from cost-free community colleges to expensive private universities, the aforementioned findings are apparently indicative of the benefits received as a result of student financial aid programs, in which the purpose of such programs acts as an equalizing force for access to high tuition instutions. Financial assistance, singularly, will not serve to overcome the gross underrepresentation of low income and minority high school graduates, however, and this is illustrated by the low entrance rates for low income students to UC and CSUC.

Low income graduates embark upon the work-a-day world at twice the rate of graduates of high income schools, i.e., one year after graduation. There are far more low income unemployed than there are high income graduate counterparts (4 percent).

In addition, 2 percent of Spanish surname and 4 percent of black graduates enter the University of California,

while at the same time, 14 percent of white graduates entered.

Opportunities for higher education continue to be inequitably distributed between high school graduates of high and low income backgrounds, the result being that the poor, who are most often ethnic minorities, are severely deprived.

The under participation of minorities in the California State Educational system was evident as of 1975:

> "On the basis of race, roughly 85 percent of both full-time and part-time learners in California are white, compared to only about 75 percent of the state's adult population. In other words, ethnic minorities are underrepresented among learners.
>
> Because Blacks, Mexican-Americans, and Native Americans have been inadequately served in the past by traditional schools and colleges, they might be expected to be overrepresented among participants in adult education. But this is not the case. As Table 2 shows, the proportion of minorities engaged in adult education in California is no higher than that of whites. Nationally, their proportion is even lower than that of whites.
>
> Past experiences with formal schooling clearly discourage many minority group members from participating in postsecondary education. In the the national CNS survey, twice as many blacks as whites mentioned such barriers as "low grades in the past," "not confident of my ability", and "don't meet requirements to begin programs" as obstacles to further education (Carp *et al,* 1974). In California, barriers for Mexican-Americans are probably even greater than for Blacks because of language problems. Postsecondary Alternatives: Meeting California Educational Needs For Postsecondary Alternatives, Prepared for the California Legislature, September, 1975."

A Report of the United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974,*

Volume III, To Ensure Equal Education Opportunity, January 1975, reflects that schools and colleges are deficient in their access to racial minorities in educational advantages provided by the state of California (p. 284).

When, as here, the State of California is promoting the intendment of the Thirteenth and Fourteenth Amendments, the Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000d and other federal remedial legislation, its action is not only permissible but should be encouraged by this Court.

What this Court held as to New York's implementing the Voting Rights Act in *United Jewish Organization* v. *Carey,* — U.S. —, 97 S.Ct. 996, (1977) at 1005 is apropos to the instant case:

> "Section 5, and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color, are constitutional. Contrary to petitioner's first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment. Nor is petitioner's second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment."

Hence, it is clear that California has had a significant amount of racial discrimination and is not free of ignominy as the majority below infers. For while the court states "[t]here is no evidence in the record to indicate that the University has discriminated against minorities in the past" (*Bakke,* 553 P.2d 1152, 1169) to justify its findings, this statement, when read against the backdrop of the badges of slavery in California in education, housing, voting and the like creates a situation against which the court cannot presume the nonexistence of glaring fact. *Id.* at 1169. This is especially true since the very people against whom an adverse opinion would irreparably injure, and who have a great interest in the outcome of this

significant case, were not before the court. *Id.* at 1169, n. 29.

What this Court held as to the exercise of power by Congress under the Fifteenth Amendment in *South Carolina* v. *Katzenbach* 383 U.S. 301, 328 (1966) ought to be applicable to the state of California in promoting the purposes of the Fourteenth Amendment:

> "After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims."

II. THE USE OF RACIAL CLASSIFICATION TO PROMOTE INTEGRATION OR TO OVERCOME THE EFFECTS OF PAST DISCRIMINATION IS NEITHER "SUSPECT" NOR PRESUMPTIVELY UNCONSTITUTIONAL.

In the late sixties, the medical school at Davis, like many other medical and professional schools in this nation realized that in order for their institutions to reflect a more heterogeneous enrollment, their traditional admissions criteria had to be changed. (See Appendix C). These schools found themselves in a segregated state even though many did not intentionally practice overt discrimination. Davis Medical School was among those schools which acted to alleviate a low minority enrollment. In fact, the University of California at Los Angeles did not graduate its first black medical student until 1970, or 51 years after being founded. Furthermore, the University of California at Los Angeles did not graduate its first black dentist until 1974, or 55 years after the founding of the Dental School. Blackwell, "Access of Black Students to Graduate and Professional Schools" 5 [Southern Educational Foundation (1975)]. Davis established a special admissions program to ameliorate its almost segregated medical school enrollment.

In the past ten years, both graduate and undergraduate schools have initiated so-called affirmative action programs

in an effort to facilitate the increase of minorities in graduate and undergraduate institutions of higher learning. However, the need for affirmative action programs has become compelling in other work and professional areas of the society where minorities were nonexistent or in areas where their presence was so low as to border on the extinct.

Amici seeks reversal of the California State Supreme Court decision in *Bakke* because it is constitutionally erroneous. First, the California Supreme Court erroneously concluded that racial classification to promote integration is presumptively unconstitutional and "suspect." This conclusion is not the law as Amici understand it. In fact, as Judge Tobriner observed in his dissenting opinion below:

> "The governing authorities . . . lend no support to the conclusion that the use of racial classifications to ameliorate segregated conditions is presumptively unconstitutional . . . . By failing to distinguish between *invidious racial classifications* and remedial or 'benign' racial classifications, the [State court] majority utilize the wrong constitutional standard in evaluating the validity of the Davis special admissions program." *Bakke* v. *Regents of University of California,* 553 P.2d 1152, 1173 (1976). (Tobriner, dissenting).

The *Bakke* case removes scabs from old wounds brought on by invidious discrimination. For the arguments raised by *Bakke* ignore what the court must not ignore: that the history of this country is replete with judicial negation of the legal existence of black people. Hence, as *Bakke* argues that race, as an element of affirmative action programs, is unconstitutional—Amici, arguing the reverse, does not hestate to remind the court of the dark past, and the accouterments of slavery which remain today.

A. Accouterments of Slavery

The *Civil Rights Cases* 109 U.S. 3 (1883) had presented the question of the extent to which the power of the federal government could be used in the protection of citizenship

rights created by Constitutional amendments and statutes. The decision in the consolidated cases established the principle, foreshadowed by the *Slaughter House Cases,* 16 Wall, 36 (1873) and *U.S.* v. *Cruikshank,* 92 U.S. 542 (1876) that Congress had no authority under the Fourteenth Amendment either to initiate legislation which impinges upon the States' police power or to establish laws which control the acts of private persons in the States. The ground was laid for another major test of the federal government's disposition to defend black Americans against assaults upon their rights *qua* citizens equal in the eyes of the law.

Plessy v. *Ferguson,* 163 U.S. 537 (1896) provided the issue on which the Supreme Court would again decide which privileges and immunities of black citizens it would construe within the realm of federal power. Homer Plessy, an Afro-American by race, was convicted in the local criminal court of New Orleans, Louisiana for violation of a state statute. The statute of import, enacted in 1890, provided that blacks and whites should not travel in the same compartments on passenger trains of Louisiana. The question of the constitutionality of the statute came before the Supreme Court by *certiorari.* The majority held that it was a valid exercise of police power for the State of Louisiana to separate train passengers by race while in the state and not a violation of the Thirteenth or Fourteenth Amendment having to do with the abolition of involuntary servitude and equal protection of the laws. Thus, "separate but equal" became constitutionally acceptable. Regarding the Fourteenth Amendment, the majority opinion included the following viewpoint:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish the distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.* at 544.

The Court, further, wrote of the impotence of law in the face of "natural" racial antipathy: "Legislation is powerless to eradicate racial instincts, or abolish distinctions based on physical differences. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly [sic] or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane." *Id.* at 551.

One Justice had a different perspective on the segregation statute and its purpose believing that "[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon legal grounds." Justice John Harlan pointedly discussed what he saw to be the socio-political and normative considerations at issue.

> "Every one knows that the statute in question had its origin and purpose . . . to exclude colored people from coaches occupied or assigned to white persons . . .
>
> The white race deems itself to be the dominant race in this country. And so it is, in prestige, . . . education, . . . wealth, . . . and . . . power. So I doubt not, it will continue to be for all time, if it remains true to its great heritage. . . . But in the view of the constitution, in the eye of the law there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights all citizens are equal before the law." *Id.* at 557.

This decision had enormous impact. Barely had the Court settled this principle for public carriers when it was extended to public schools and, tragically, the "equal" was lost. In *Cumming* v. *Richmond County Board of Education*, 175 U.S. 528 (1899), the Court was presented with the following facts: The Ware High School of Richmond County, Georgia, a public school for blacks was suspended 'for economic reasons'. The high school for white children

in Richmond County continued to operate. Cumming's, a black taxpayer, took the matter to court complaining that the action closing the black school was discrimination against Black Americans and a violation of the "equal protection" and "privileges and immunities" clauses of the Fourteenth Amendment. The record of the trial revealed no abuse of discretion permitted under the law to the Richmond County Board of Education. Although, the constitutionality of laws providing for separate accommodations for blacks and whites in public schools of the States was attacked in the argument of Cumming's counsel, the question was not presented. The blacks of Augusta, Georgia brought suit against the Board and asked for a judicial remedy for closing the white high schools since *Plessy* required "equal facilities". Upon writ of error the United States Supreme Court affirmed the decision of the lower state court (the Supreme Court of Georgia) upholding the school Board's action. Ruling that the County Board did not have to maintain a high school for blacks or close the white high schools, Justice John Harlan, for the Court, stressed:

> "[W]hile all admit that the benefits and burdens of public taxation must be shared by the citizens without discrimination against any class on account of their race, the education of people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land." *Id.* at 545.

By the turn of the century "separate but equal" in the eyes of the law which in fact was translated into "separate but unequal" became the rule for treatment of Black Americans. This, in addition, to deprivation of rights in other questions before the court involving blacks, such as jury service, suffrage and due process led to the degeneration of the legal status of Black Americans. The decision against federal intervention to protect black rights except in ob-

vious instances of state violation of federal laws (narrowly construed) marked an abandonment of Black Americans and the legalization of inequality. This is evident in numerous aspects of the lives of Black Americans including voting, jury service, housing, employment, public accommodations, racial violence and education. As late as the mid-1930's the status of Black Americans remained similar to that of indigenous blacks under the system of apartheid in the United States. Rayford W. Logan, *Betrayal of the Negro* (New York, 1965); C. Vann Woodward, *The Strange Career of Jim Crow*, (New York, 1966); Charles Mangum, *The Legal Status of the Negro* (Chapel Hill, 1940); Richard Bardolph, *The Civil Rights Record* (New York, 1970); William H. Hastie, *"Toward An Equalitarian Legal Order"*, 407 *Annals of the American Academy of Political and Social Science* 18 (1973)

To examine the Afro-American experience during the first third of the Twentieth Century was to view, in the words of Mr. Justice Douglas, "a spectacle of slavery unwilling to die." *Jones* v. *Mayer*, 393 U.S. 409 (1968). Citizens, charged with the enforcement of law, and private persons engaged in activities were instruments which disfranchised the black voter. See e.g. *Guinn* v. *U.S.*, 238 U.S. 347 (1915); *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Grovey* v. *Townsend*, 295 U.S. 45 (1935); *Breedlove* v. *Suttles*, 302 U.S. 277 (1937); *Lane* v. *Wilson*, 307 U.S. 268 (1939). Blacks, solely on the basis of race, were deprived of the right to serve on juries. See e.g., *Smith* v. *Texas*, 311 U.S. 128 (1940) and *Hill* v. *Texas*, 316 U.S. 400 (1942). Blacks have been deprived of the right to own and convey property based upon race, and either have been forced to live in segregated areas or denied access to privately designated white areas. See e.g., *Buchanan* v. *Warley*, 245 U.S. 60 (1917); *Corrigan* v. *Buckley*, 271 U.S. 323 (1926), *Harmon* v. *Tyler*, 273 U.S. 608 (1927); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Black Americans have been denied gainful employment, discriminated against in employment benefits and opportunities for

grounds having nothing to do with character or training but race alone. See e.g., *Hodges* v. *U.S.*, 203 U.S. 1 (1906), and *Steele* v. *Louisville and Nashville Railroad Company*, 323 U.S. 192 (1944). See also, Robert Weaver, *Negro Labor* (New York, 1946) and Sterling Spero and Abraham Harris, *The Black Worker* (Reprint edition, New York, 1968). Separation of the races in the use of public facilities was forced by law. The notion of inferiority attached to former slave status and race reenforced segregation has tended to support unequal treatment in, for example, dining cars, restaurants, buses, public beaches and public parks. See e.g., *McCabe* v. *Atchison, Topeka and Santa Fe Railroad*, 235 U.S. 151 (1914); *Lombard* v. *Louisiana*, 373 U.S. 267 (1963); *Gayle* v. *Browder*, 352 U.S. 903 (1956); *Mayor of Baltimore* v. *Dawson*, 350 U.S. 877 (1955); *New Orleans Park Improvement Association* v. *Detiege*, 358 U.S. 54 (1955). Where it seemed to be within the power of the federal government under the Reconstruction Amendments and Civil Rights statutes to intervene in states to protect the lives of black people, Presidents and Attorney Generals failed to act. Lacking this, Congress failed to pass legislation against mob violence, such as lynchings. See e.g., Mary F. Berry, *Black Resistance/White Law* (New York, 1971), Arthur Raper, *The Tragedy of Lynching* (Chapel Hill, 1933) and *Moore* v. *Dempsey*, 261 U.S. 86 (1923). In the field of education, most relevant to this case, blacks were not provided with equal educational opportunities on any level and for many the education received was offered in separate, unequal facilities on unequal terms. Whether or not statutory segregation existed in a state as illustrated by *Cumming, supra*, discrimination on the basis of race continued to be the policy. *Opportunities to take advantage of public education decreased as black interest moved from secondary to college and graduate or professional education.* See John Fleming, *The Lengthening Shadow of Slavery* (Washington, D.C., 1976), Loren Miller, *The Petitioners* (New York, 1956), Richard Kluger, *Simple Justice* (New York, 1977), *Brown* v. *Board of Education*, 347 U.S. 483,

(1954); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). See also, Horace Mann Bond, *Education and the Negro in the American Social Order* (reprint edition, 1956).

The struggle against segregated schools and unequal education opportunities illustrates graphically how fundamentally racism influenced policy in the first half of the Twentieth Century. The experience of Afro-Americans with public education was colored by not only *Cumming* which established the right of the state to regulate the public education provided its youth, but also *Berea College* v. *Kentucky,* 211 U.S. 45 (1908) and *Gong Lum* v. *Rice,* 275 U.S. 78 (1927) in which the Court held that segregation in the public schools was not violative of the principle of "equality before the law"; that it was unlawful for a state chartered corporation to operate a private school with integrated classes and that state legislatures might settle issues relative to education at the public expense without federal court intervention.

During a protracted, organized struggle through the courts, NAACP lawyers led in the main by Charles Houston with the assistance of many dedicated black lawyers, cases were argued to establish precedents in support of equality and then desegregation. Houston, as the first, Special Counsel of the NAACP, reasoned that a protracted struggle was appropriate since not only a portion of the white masses had to be neutralized and persuaded of the logic and justice of the NAACP position for equality, but also the judges hearing arguments were part of the judicial process of the United States which operated with a keen awareness of and reverence for *stare decisis* and judicial parsimony. With the "real aim . . . to abolish all segregated schools" Houston pursued a line of cases which he believed would lead to the "elimination of segregation." McNeil, "Charles H. Houston," 3 *Black Law Journal* 123 (1974). The course charted began on the state level in 1935. Donald Gaine Murray sought a legal education in the state of Maryland. In 1935 he took his

complaint of the state University's refusal to admit him to court. By 1936 the Maryland Court of Appeals held that Murray should be admitted to the existing state law school in compliance with equality under the law guaranteed by the Constitution, *Pearson* v. *Murray,* 182 A. 590 (1936). Between 1938 and 1954 Constitutional principles were argued by civil rights attorneys and affirmed by the United States Supreme Court. See *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337 (1937); *Sipuel* v. *Oklahoma,* 332 U.S. 631 (1948), *Sweatt* v. *Painter,* 339 U.S. 629 (1950), *McLaurin* v. *Oklahoma,* 339 U.S. 639 (1950). The year 1954 witnessed the fulfillment of the dream of the NAACP and Legal Defense Fund lawyers. In *Brown I, supra,* at 495 the court held "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and other similarly situated . . . are . . . by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment". A similar conclusion was reached and segregated education in the District of Columbia adjudged a deprivation of liberty in that it was violative of the due process clause of the Fifth Amendment and *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

The above cases establish without a doubt that racial classifications cast an ignominous shadow over the nation's history and its basic fundamental principles as a free democratic society. Yet, in all the cases excluding blacks and other minorities from access to public and private places, racial classifications were designed, utilized and enforced to "explicitly or covertly, to stigmatize, exclude and accord inferior treatment to minorities". *Bakke, supra* at 115. See e.g., *Jones* v. *Mayer,* 392 U.S. 409, 445-447 (1967); *Gayle* v. *Browder,* 352 U.S. 903 (1956); *Hunter* v. *Erickson* 393 U.S. 385 (1969).

As progenies of slaves in this country, Amici has always labored under the belief that the purpose of the

Fourteenth Amendment was for the benefit and the protection of black people. Amici has relied on the *Slaughterhouse Cases,* 83 U.S. (16 Wall.) 36, 81 (1873); accord, Speech of Senator Edward Brooke, "Crisis in Affirmative Action," Georgetown National Law Center 4-5 (May 25, 1977) as a basis for their belief. Racial classifications at issue in this case are those designed to erase the "badges of slavery" *Jones* v. *Mayer, supra* at 445 and to promote the constitutional goals embodied in the Fourteenth Amendment.

B. Promotion of Integration in California

The burden of proof was on Bakke to establish that the program as administered by the University of California fell outside the protection of the purpose of the Fourteenth Amendment, as well as beyond the protection of state law and announced policy. Simply stated: Bakke failed to carry this burden as a matter of fact and law. This failure becomes more pronounced when even the casual reader assesses the legislative hearing of the California Legislature of March 2, 1977, in which David Saxon, President of the University of California stated:

> "We are determined to provide new opportunities for members of groups who have been underrepresented in higher education, both because it is right and because the entire society ultimately benefits from the fullest possible realization of individual potential . . .
>
> "But there is no blinking the fact that accurate measures of human potential may be some years away. And in the meantime, in justice to students whose promise deserves the opportunity for fulfillment and to a society which needs their contributions, we have instituted various kinds of special admissions programs which, for lack of better measures not yet available, give weight to ethnic origin. At this stage, such special programs are clearly the most effective

> way of improving minority access to graduate and professional instruction. And that is why we have pursued the full judicial avenues in the *Bakke* case so tenaciously and will continue to do so.
>
> "In the long run, however, race is not the best measure to use—and I say this not only because the use of race can be invidious but because it is so crude a measure, so impoverished a way of classifying human beings. And so we will continue to work throughout the University on finding better measures of human potential.
>
> "But let no one mistake our motives in pursuing the search for better admissions techniques at this time. The search does *not* indicate that we believe we are likely to lose the current case before the Supreme Court, or that we are not marshalling our best talents and committing our fullest energies to winning the case. We *must* win, because we are still developing other and better measures, and minority enrollments would surely suffer if we could not continue using race as a direct measure for some time to come.
>
> "If minority enrollments suffer, some minority students with high potential would be lost to themselves and to society. And that discrimination against human potential, however unintended and however related to our present inadequate measures, must not be allowed to happen. It is to prevent that most tragic kind of discrimination that the University is determined to persuade the highest court in the land of the justice—the rightness—of missions procedures that will preserve the access of promising minority students to our colleges and universities."

Transcripts and Statements, Hearings On the Bakke Decision California State Legislature at p.p. 91-93, March 2, 1977 (NO. 603) (original emphasis)

It is noteworthy that the notion that blacks have caught up to a point where a neutral application of the law should now be applied is rebutted by President Saxon's testimony before the California Legislature. This educa-

tor flatly states that at this time special admissions programs are "clearly the *most* effective way of improving minority access to graduate and professional instruction".

C. The Racial Classification In This Case Is Constitutionally Permissible

Where segregation results directly or indirectly from past or present racially motivated public policies the Constitution has been held to *require* favorable treatment of minorities. See, for example, *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir., 1966), cert. denied 389 U.S. 840, 19 L.Ed. 2d 103 (1967) which held that school districts formerly segregated by law must go beyond neutrality and take affirmative action to bring Negroes into formerly white schools. In *Carter* v. *Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971), cert. denied 406 U.S. 950, 32 L.Ed. 2d 338 (1972), the court stated:

> "It would be in order for the District Court to mandate that one out of every three persons hired by the [Minneapolis] fire department would be a minority individual who qualifies until at least 20 minority persons have been so hired."

Indeed, this Court has emphatically recognized the utilization of racial classification of students to achieve integration in school assignments. The Court had made this rather clear:

> "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also *must* race be considered in formulating a remedy." *Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971).

And where there is racial imbalance not resulting from racially motivated public policies, the courts have permitted the public agency to remedy that imbalance by giving preference to minorities. For example, in *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970), the court held that a school board may give preference to black teachers over white teachers in order to integrate the faculty and stated:

> "State action based partly on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment."

The United States Supreme Court has recognized that the equal protection clause does not inflexibly require blindness to the special problem and needs of minority groups. In *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 16, 28 L.Ed. 2d 554, 566 (1971) the court held that school authorities may assign minority students to a particular school in the same proportion to its student body as the minority bears to the whole population:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court."

Even if we assume, contrary to the facts, that Plaintiff was displaced from the Davis Medical School because of the special admissions program, he is in exactly the same position as a Caucasian student displaced from school by the operation of the minority program at issue in *Swann*, or a Caucasian teacher who failed to be promoted because of the minority preference in *Porcelli*.

Thus, the broad discretion of admission officers to accept those students it deems necessary for the benefit of

the school, the profession, and society includes discretion to consider minority group status.

This statement compliments and supports Judge Trobriner's statement that:

> "The racial classifications embodies in the special admissions program are not intended to, nor do they in fact, exclude any particular racial group from participation in the medical school; on the contrary, the program is aimed at assuring that qualified applicants of all racial groups are actually represented in the institution." 553 P.2d 1152, 1175 (dissenting).

Unless the current trend and state of the law is that integration and its effectuation via special programs which promote integration are per se invidious, the California Supreme Court must be reversed. As stated and supported throughout Amici brief, the compelling state interest is lodged squarely in the recognition that at present there is no other way of improving minority access to graduate and professional instruction.

In sum, the central purpose of the equal protection clause of the Fourteenth Amendment to the United States Constitution and of the federal civil rights acts was to protect black people against oppression and discrimination by the majority. See, e.g., *Strauder* v. *West Virginia*, 100 U.S. 303 (1880). The Supreme Court's doctrine that racial classifications are constitutionally "suspect" arose in the context of classifications that had the purpose or effect of disadvantaging racial minorities. See, e.g., *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). The Court has not implied that nonoppressive and nonindividious racial classifications are suspect or impermissible, but on the contrary, has permitted race to be taken into account for remedial purposes. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). See generally Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 *U. Chi. L. Rev.* 723 (1974).

We do not argue that benign racial classifications should be immune from judicial scrutiny. The use of race always carries potential for abuse, which calls for scrutiny more demanding than the illusory "minimally rational" classification standard that is often applied to economic regulations. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1 (1972). In examining a program purporting to aid rather than oppress traditionally disadvantaged minorities, the court should inquire whether the program is in fact designed and operated so as to substantially further constitutionally legitimate and important social objectives. See, e.g., *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920); *Nebbia* v. *New York*, 291 U.S. 502 (1934).

D. The Special Admissions Program at the Davis Medical School Serves Rational and Compelling State Interests.

The general rule is that a classification must be sustained against a claim of denial of equal protection if there is *any* rational basis for it. The United States Supreme Court has, however, carved out a narrow exception to this rational basis test: when the classification is to the detriment of a minority race it is called a "suspect" classification requiring proof that the objective of the classification serves a *compelling* state interest rather than merely any rational state interest. See "Development in the Law—Equal Protection". 82 *Har. L. Rev.*, 1965 (1969); *McLaughlin* v. *Florida*, 379 U.S. 184, 13 L. Ed. 2d 222 (1964). The rational basis test would appear to apply in this case as the classification used by the Davis Medical School is not based solely upon the racial or minority classification of an applicant. The United States Supreme Court has never held or stated that race is a "suspect

classification" triggering the compelling interest test when the purpose and effect of a classification is to benefit minorities. Indeed, it is clear from the decisions of the Court, that the suspect classification category was created to protect racial minorities. There is every indication that this extraordinary exception to the rational basis test is a shield protecting minorities against discrimination and not a sword preventing society from redressing the effects of historical discrimination against minorities. *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (2nd Cir. 1968).

In any event, the special admissions program at the Davis Medical School meets either the rational interest or the compelling interest test. The fact is that adequate medical and legal services to minority group persons is one of the great unmet medical and legal needs in our society and doctors and lawyers from such backgrounds are seriously under-represented in the medical and legal professions. This condition can be improved by admission of students from these groups.

E. Impact On The Professions Of Law And Medicine For Black Americans: A Compelling State Interest

As illustrative of the broader issue involving affirmative action programs and their constitutional efficacy, this Court last term had before it the issue of affirmative action involving law school admission of black students. *DeFunis* v. *Odegaard,* 416 U.S. 1038 (1974). Today, the Court is faced with another important professional aspect of the American society: the admission of minority applicants to medical schools as a result of affirmative efforts. As the following discussion points out "The black legal community of this nation is small, far too small to address itself to the myriad and more complicated legal task which it is frequently called upon to undertake." Smith, *Towards a Houstonian School of Jurisprudence and the Study of Pure Legal Experience,* 18 *How. L.J.*

1, 10 (1973). Likewise, the black medical community is small and is not capable of serving numerous blacks in need of medical care and treatment. The ominous threat of the extinction of other professions in which there are few or no blacks hangs in the balance if the opinion of this Court should side with those arguing that affirmative action programs are not constitutionally protected.

Hence, the *Bakke* position fundamentally affects equal opportunity for black participation in American society in the area of law and medicine, and all professional life itself.

As statistics bear out, there are few blacks among members of the American bar. Significantly "[b]etween 1900 and 1940 the percentage of representation of Blacks in the bar ranged between .6 and .8 percent. . . . [T]he lawyer population generally grew very little between 1900 and 1920 . . . [B]etween 1930-1940 it increased almost 40,000." Tollet, *Black Lawyers, Their Education and the Black Community,* 17 *How. L.J.* 326, 346 (1972).

United States History with its continuous themes of struggles for liberty and against racial injustice, has demonstrated, in a telling way, the major importance of lawyers to the nation. "Traditionally, lawyers have played a critically important role in the political and economic development of the United States. Twenty-five of the fifty-six signers of the Declaration of Independence were lawyers. Thirty-one of the fifty-five members of the Constitutional Convention were lawyers. The United States House of Representatives and Senate and the state governments and legislative bodies across the country have had a larger proportion of officials and members from the legal profession than from any other profession . . . [P]erhaps no society, culture or country has permitted or projected lawyers to the level of prominence they have had in the United States since the Declaration of Independence." *Id.* at 326-27. Major issues of power

and authority, civil liberties and civil rights confronted by the society more often than not have ended in litigation. Black lawyers, leaders in the political arena and counsel in the courts, have managed and resolved such national confrontations and disputes. See Alfred Kelly and Winfred Harbison, *The American Constitution* (Revised edition; New York, 1976); Norman Dorsen, ed., *The Rights of Americans* (New York, 1970); See e.g., *Fletcher* v. *Peck*, 6 *Cranch* 87 (1870); *American Communications Association* v. *Douds*, 339 U.S. 382 (1950); *Dennis et al.* v. *United States*, 341 U.S. 494 (1951); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), *Hodges* v. *United States*, 203 U.S. 1 (1906); *Norris* v. *Alabama*, 294 U.S. 587 (1933), *Steele* v. *Louisville & Nashville Railroad Company*, 323 U.S. 192 (1944); *Shelley* v. *Kramer*, 334 U.S. 1 (1948); *McLaurin* v. *Oklahoma*, 339 U.S. 637 (1950); and *Brown* v. *Board of Education*, 347 U.S. 483 (1954). *This case now before the Supreme Court, is another instance in which minorities in the legal profession have come to be relied upon as advocates in a matter involving equal opportunity for minorities in higher education in a democratic society.*

In 1976, the total number of white lawyers in the United States was estimated to be 400,000 while the total number of black lawyers was approximately 7,500 or 1.8% of the profession. A 1976 Association of American Law Schools' survey of minority group students in legal education indicates a total of 5,503 Black Americans enrolled in approved law schools 1976-77 as compared with 5,127 in 1975-76 and 2,128 in 1969-70. The "largest absolute increase in first year enrollment was that for blacks [i.e., 2,045 (1975-76) to 2.128 (1976-77)]; however, the increase of 83 in the first year for black law students represented the smallest percentage increase of the six groups [i.e., Black American, Chicano, Puerto Rican, other Hispanic-American, Asian or Pacific Islander, Native American or Alaskan Native]." Rudd, Executive Director, Association

of American Law Schools, Memorandum to Executive Committee, April 1, 1977 (Washington, D.C., 1977); Slocum, Executive Director of Council on Legal Education Opportunity, "Statistical Information on The Black Lawyer", April 7, 1977 (Washington, D.C., 1977); See also National Bar Association's "Survey of the Black Lawyer" (Washington, D.C. 1972). Nevertheless, United States Census Bureau Statistics which place the population of the nation in 1970 at 203,211,926: 22,580,289 black and 177,-748,975 white Americans—prompt the conclusion that there remains a need for black lawyers. Commerce Dept., Bureau of the Census, "Population . . ." (1970).

The available pool of black lawyers has increased in absolute numbers *but the percentage of blacks in the profession among all lawyers is not notably higher now than it was more than forty years ago.* According to the estimates in 1930, black lawyers comprised less than .007 percent of the entire profession. Although figures vary, it appears that as compared with 159,735 white lawyers, there were between 1,175 and 1,230 black members of the bar. Houston, "The Need For Negro Lawyers" 4 *Journal of Negro Education* 49 (1935). In the words of Dr. Charles Houston, a prominent black jurist of the period, despite the fact that arguments could be made that "there [were] enough white lawyers to care for the ordinary legal business of the country", there was a "Need For Negro Lawyers". "Ordinary legal business" did not constitute the total work of attorneys in the United States then any more than it does now. "[W]here . . . pressure is greatest and racial antagonism most acute . . . the services of the Negro lawyer as a social engineer [were] needed." *Id.*

The need for Negro lawyers expressed by Dr. Charles Houston in 1935 has not changed in forty years even with recent affirmative action efforts. The society has continued to produce an abundance of white lawyers while the number of black lawyers, to say nothing of Americans of

Spanish descent and American Indians, has remained static or inconsequential. Griffin, *Admissions: A Time for Change,* 20 *How. LJ.* 128, 134, n.23 (1977). As Professor Griffin points out it is disquieting to know that blacks constitute 11.4 percent of the republic, yet comprise 1.8 percent of the republic's legal profession; and disquieting to know that Americans of Spanish descent make up 4.4 percent of the population and comprise 0.9 percent of the legal profession; and disquieting to know that the American Indian comprises 800,000, yet may count fewer than 325 Indian attorneys among its population. A recent report by the Vice President for Academic Administration at Temple University indicates that there is one black attorney for every 5,000 blacks as compared with one white attorney for every 750 whites. Watson, "The Future of Graduate and Professional Schools," Conference on Advancing Equality of Opportunity: A Matter of Justice (Washington, D.C., May 15, 1977).

The number of black lawyers and law students has always been disproportionate to the needs of the black community and the nation. This problem has been addressed in major studies by black legal scholars since 1927. An examination of studies demonstrates clearly how gradually blacks have moved into the legal profession.

In 1934-1935, Houston and another black legal scholar, Fitzhugh L. Styles, author of *Negroes and the Law,* further indicated the pressing need for black lawyers in studies which reviewed the size of the legal profession by state in 1934 and juxtaposed white and black lawyers. Houston, "The Need for Negro Lawyers" 4 *Journal of Negro Education* 49, 50 (1935); Styles, *Negroes and the Law,* 232, 234 (1937). These studies showed black lawyers represented .007 percent of the total population of the legal profession in 1935. There were then fewer than 1,230 black lawyers in the nation.

A later "Black Lawyer's Study" prepared by Professor Jerome Shuman, indicated that even by 1971, black lawyers comprised less than one per cent of the entire profession due to both "inability to afford a legal education" and the "exclusionary practices of many of the law schools." Shuman, "A Black Lawyers Study", 16 *How. LJ.* 225, 229-230 (1971). Hence, there has been some progress in the past six years, but not nearly enough effort to "jump and shout"!

It is clear from Shuman's study that by 1971, or 36 years after Houston's study, the number of black lawyers had increased by only 3,000 black attorneys. Today, there are approximately 7,500 black lawyers, as opposed to nearly 400,000 white attorneys. In 1935 there were 158,-735 white attorneys. In short, there has been no significant increase in the black lawyer population, and the concerns voiced by Houston in 1935 remain constant in 1977. Indeed, Professor Tollett has concluded that "[U]ntil . . . oppressed minority groups approach proportional representation in law school and the bar, *preferential or special recruitment programs imperatively should continue apace.*" Tollett, *supra* at 352 (emphasis added).

The impact of Bakke operates to summarily undermine the need and desire for equal opportunity in the field of medicine, also. Historically, the medical profession has been grossly under-represented in terms of black participation and membership, thus demanding the necessity for greater black enrollment in medical schools. (See Appendix C) A recent, yet unpublished statistical study prepared by Dr. Elizabeth Abramowitz of the Institute for the Study of Educational Policy is most illustrative of this theory. Abramowitz, "Black Enrollment in Medical Schools" *More Promise Than Progress* (Institute for the Study of Educational Policy—Howard U., Wash., D.C.)

Dr. Abramowitz's study reveals a well-known fact that the need exists for "more doctors as health providers sensitive to the needs of black patients and as medical researchers studying health problems related to social class and race." Notwithstanding medical research, federal involvement with medical schools has centered around providing financial assistance for the training of those persons promising to work in underserved rural and urban communities. In spite of this attempt, however, the number of black doctors in the United States falls short of being described as negligible.

In 1974, for example, black doctors comprised 2% of all practicing doctors in the U.S., while at the same time, black citizens comprised 11% of all citizens. Keeping these figures in mind, if the only means of health service accessible to blacks emanated from the 6,600 black doctors, there would be only one black doctor for every 3,400 black persons. In comparing this situation with the then existing 330,000 white doctors, there would have been one white doctor for every 557 white persons. The result: the black doctor continues to be a limited resource in the medical delivery system for black and white patients, similarly.

The American Medical Association, hoping to alleviate this "supply" problem, endorsed the remedy of "increasing the number of black medical students to a figure roughly proportional to the black population." The goal set in the late 1960's, by the AMA, was to have 10% black enrollment in medical schools by the mid-1970's. In 1969, however, blacks totalled 2.8% of the 37,669 medical students, and by 1974, blacks totalled only 6% of the 53,554 medical students. Granted, that in this time span black enrollment in all medical schools increased 223% (from 1,038 in 1969 to 3,355 in 1974), however, black enrollment in all medical schools has not reached, and is not even near reaching, a comparable degree of similitude with the black population.

In 1969 only two historically black medical schools existed in the U.S., Howard University and Meharry Medical College, and these schools enrolled slightly less than one-half (46%) of all black medical students. However, by 1973, black enrollment in historically black medical schools accounted for only 21% of all black medical students. In other words, between 1969 and 1972, the most significant increase in black enrollment in medical schools occurred on the campuses of historically and predominantly black medical schools.

This racial isolation in the fields of law and medicine is indicative of the racial isolation and non-access of blacks to other professional and highly technical fields.

It must follow where a state decides within the exercise of its police power that there is a compelling state interest to correct this glaring tragedy on the promise of equality, that such a state policy is permitted under the Fourteenth Amendment.

III. THE RATIONALE OF BROWN COMMANDS THE REVERSAL OF THE CALIFORNIA SUPREME COURT

This Court's pronouncement in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955) signalled and simulated a great advance in the struggle of blacks for full equality in this society. To understand and appreciate *Brown's* impetus to the Civil Rights struggle it is necessary to understand what the struggle was and is. *It is a struggle to obtain pure legal existence for black people in American.*

In *Brown* v. *Board of Education,* supra, the United States Supreme Court concluded "that in the field of public education the doctrine of 'separate but equal' has no place." *Id.* at 495. This court uttered that "the plaintiffs . . . for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Ibid.*

The *Brown* decision was written to free the republic of the psychological knowledge at the time of *Plessy* v. *Ferguson, supra,* as well as to repudiate the doctrine which is associated with its name. Hence, the court opened the door to black people in this nation to roam its fields, to climb its ladders in the arts and humanities, to tinker with its values, and to allow access to street cars as well as this nation's medical and other professional schools of higher education. The *Brown* decision was a judicial announcement of existence for black people and others similarly situated in a democratic society. Blaustein and Ferguson, *Desegregation and the Law* (Knoff 1962).

It would seem, as Professor J. Clay Smith, Jr. has written, that affirmative action is but another element of black people's struggle to obtain pure legal existence in America. Smith, *Towards A Houstonian School of Jurisprudence and the Study of Pure Legal Existence,* 18 *How. L.J.* 1 (1973). Professor Smith has written:

> "Throughout the history of black people in America there has been a profound physical and intellectual struggle to be free, to be treated fairly under the law by persons charged with the responsibility of enforcing the law or by those charged with its interpretation. Unequal treatment of black people in the form of custom, local and national laws, early court cases

> (and no doubt administrative decisions) obviously negated the application of the natural law to black people. Today, by-and-large, the lack of recognition of the metaphysical worth of black people stems from the mistaken belief that black people are less than human. This negative phenomenon lodged itself into the common and statutory laws and customs in early American history. Legal negation, whether in the nature of expressed or implied law, or by application or interpretation, has left its mark on the minds of the citizens of America, both black and white. To the extent that the uneven and disparate application of the law has left any notion of the lack of the worth and human dignity of black people, or has interfered in any way with their natural right to freely participate in a republic born on a philosophical base that all men are created equal under law—to that extent, black people have been denied a pure legal existence. Pure legal existence looks to the future but studies the present and the past of the law that touches black people and those similarly situated, in order to trace, to ascertain, and to analytically assess the growth of how near they are to an existence which is free from racial discrimination. Pure legal existence, then, is an existence, under law, which is barren of racial discrimination in law and in its application; it encompasses being in a society in which the accouterments of slavery are no more." *Id.* at 4-5.

Out of the struggle to obtain a pure legal existence for black people in America there were legions of lawyers who have entered the legal arena to cast a new and innovative approach and to give a more profound meaning to the rule of law as written and as applied to black people. As Professor Smith observed:

> "That approach assisted in the formulation of the legal strategy to rewrite an historical tragedy—racism. . . ." *Id.* at 5.

The Civil Rights struggle today is indebted to the Houstonian School of Jurisprudence for its legal planning and strategy and for the men and women it has trained and inspired to use the law as a tool for social progress to realize a pure legal existence for black people in America.

Chief Justice Taney in *Dred Scott* v. *Sanford*, 19 How. 393, 403 (1857), with great legal scholarship, has best described the legal position of black people before the Civil War. Blacks were "non-beings" in the law. Taney could not find within Anglo-American jurisprudence a legal description for blacks. He could not classify them within the existing tools for legal characterization. In the words of Taney:

> "The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.
>
> It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.
>
> It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.
>
> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." *Id.* at 407.

To achieve and perpetuate this legal non-being in the words of Frederick Douglass:

> "To make a contented slave you must make a thoughtless one, . . . darken his moral and mental vision, and . . . annihilate his power of reason. He must be able to detect no inconsistencies in slavery. . . . It must not depend upon mere force: the slave must know no higher law than his master's will."

The words of Mr. Justice Douglas, concurring in *Jones* v. *Mayer Co.*, *supra* at 445-447, are sobering in reflecting upon the viability of the system to continue its oppression of blacks:

> "Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which

have come to this Court depict a spectacle of slavery unwilling to die."

The legal struggle for equality of opportunity to which *Brown* gave great impetus is still far from its stated objectives and goals. This litigation brings before this Court the most serious challenge to the Civil Rights advancement raised since *Brown*.

The importance of the field of education to the Civil Rights advancement has been stated by Professor Smith thusly:

> "Educational opportunity has been long the major focal point for the removal of barriers to better jobs in the government and industry for providing the training of teachers to teach black children to read, to write, and to facilitate their learning with dreams of professional achievement and creativity in the arts. Nonbeing for black people has been the history of bondage which existed in America, the historical negation of educational opportunities, and the disparate treatment in nearly every endeavor by blacks who have sought to drink from the well of equality and to eat from the tree of life in a society in which no man is above the law." 18 *How. L.J.* 1, 8-9.

The concept of affirmative action in the United States was in its inception designed to award preference to Blacks and other minorities in employment and education. The beneficiaries of affirmative action are the victims of past and present discrimination. Visualized as a remedial tool, the concept is a method for redress. As was stated in Karst, "Affirmative Action and Equal Protection", 60 *Va. L. Rev.* 955, 964 (1974): "The overriding purpose of affirmative action is not to remedy yesterday's discrimination, but to serve today's social needs."

The late President Lyndon B. Johnson summarized America's moral dilemma of race in the following language:

> "For the cries of pain, and the hymns and protests of oppressed people, have summoned into convocation all the majesty of this great Government, the Government of the greatest Nation on earth. Our mission is at once the oldest and most basic of this country: to right wrong, to do justice, to serve man. In our time we have come to live with the moments of great crisis. Our lives have been marked with debate about great issues—issues of war and peace, issues of prosperity and depression. But rarely, in any time, does an issue lay bare the secret heart of America itself. Rarely are we met with the challenge, not to our growth of abundance, or our welfare or our security—but rather to the values and the purposes and the meaning of our beloved Nation. The issue of equal rights for American Negroes is such an issue. And should we defeat every enemy, and should we double our wealth and conquer the stars and still be unequal to this issue, and then we will have failed as a nation." U.S. President, Johnson "Message Relative to the Right to Vote", (March 15, 1965).

It is the view of Amici that in order to achieve effective and positive results under the mandate of affirmative action, racial classifications and preferential treatment are necessary. Race must be taken into account in order to effectuate the goal of an integrated society.

The concept of preferential treatment has its origin in the Civil War Amendments and the Reconstruction Acts. Both were primarily adopted to benefit former slaves and to correct their former conditions of servitude.

Historically, Congress has demonstrated a disposition to provide special opportunities and relief for the formerly enslaved Blacks. The thrust of such actions gave rise to educational assistance (1863), to the development of the Freedmen's Bureau (1865-67) and to special finan-

cial assistance toward the development of higher education for the freedmen (1867-1928).

In 1863, before the Emancipation Proclamation, and preceding the creation of the Freedmen's Bureau, Congress was cognizant of the need to educate those who were in human bondage. Therefore, Congress by its own initiative incorporated an institution for the education of colored youth in the District of Columbia. The stated objectives of the institution were:

> "To educate and improve the moral and intellectual condition of such of the colored youth of the nation as may be placed under its care and influence . . . ." 12 Stat. 796 (1863).

In 1865, Congress deemed it not only necessary and permissible under the Thirteenth Amendment, but also within its powers to establish an agency which would provide assistance and relief as well as protect the rights and interest of loyal white refugees driven from their homes as a result of war and freedmen.

"An act to establish a Bureau for the relief of Freedmen and Refugees" provided that:

> [T]here is hereby established in the War Department, to continue during the present war of rebellion, and for one year thereafter, a Bureau of refugees, freedmen, and abandoned lands, to which shall be committed of all abandoned lands, and the *control* of all *subjects* relating to refugees and freedmen from rebel states, or from any district or country within the territory embraced in the operations of the Army, under such rules and regulations as may be prescribed by the Bureau and approved by the President. The said Bureau shall be under the management and control of a commissioner to be appointed by the President by and with the advice and consent of the Senate." 13 Stat. 507 (1865)

In 1866, one year before the termination of the Act establishing the Freedmen's Bureau, Congress acted to lengthen the term of the Act, but also to broaden its scope, thereby reinterating its concern for the freedmen. President Johnson, in February 1866, vetoed the legislation on constitutional grounds, arguing that there was no longer a need for a special agency such as the Freedmen's Bureau to administer to the affairs of the freedmen.

> "The war has substantially ceased; the ordinary course of judicial proceedings is no longer interrupted; the courts, both State and Federal, are in full, complete, and successful operation, and through them every person, regardless of race and color, is entitled to and can be heard. The protection granted to the white citizen is already conferred by law upon the freedmen; strong and stringent guards, by way of penalties and punishments, are thrown around his person and property, and it is believed that ample protection will be afforded him by due process of law, without resort to the dangerous expedient of 'military tribunals', now that the war has been brought to a close." 74 *Congressional Globe* 3838.

Johnson also, objected to the Bureau's unbridled authority to confiscate abandoned lands.

On July 16, 1866, Congress by two-thirds vote overrode Johnson's veto of the Freedmen's Bill. *By overriding the veto, Congress reaffirmed its policy commitment to provide special relief and assistance to the Negro.*

The second enactment of the Freedmen's Bureau, like the first, operated under the express powers of Congress. 71 *Congressional Globe* 918.

Section 12 of the Act goes further than the original Act by explicitly showing Congressional concern for the education of freedmen:

> "Section 12: And be it further enacted, that the commissioner of this bureau have power to seize, hold, use, lease or sell all buildings and tenements,

and any lands pertaining to the same, or otherwise formerly held under color of title by the late so-called confederate states, and not heretofore disposed of by the U.S. and any buildings of lands held in trust for the same by any person or persons, and to use the same or appropriate the proceeds derived therefrom to the education of the freed people; and whenever the Bureau shall cease to exist, such of said so-called confederate states as shall have made provision for the education of their citizens without distinction of color shall receive the sum remaining unexpended of such sales or rentals, which shall be distributed among said state for educational purposes in proportion to their population." 14 Stat. 176. (1866).

Section B of the same Act indicates clearly that Congress intended the Commissioner of the Bureau to oversee the education of the freedmen.

> "And be it further enacted, that the commissioner of this Bureau shall at all times cooperate with private benevolent association of citizens in aid of freedmen, and with agents and teachers, duly accredited and appointed by them, and shall hire or provide by lease buildings for purposes of education whenever such association shall, without cost to the government, provide suitable teachers and means of instruction; and he shall furnish such protection as will be required for the safe conduct of such schools." *Id.*

By 1866, Congress set forth as one of its primary objectives for the Bureau through its Commissioner, the monumental task of overseeing the education of the freedmen.

Bureau implementation of this Act and a general policy to provide assistance to Blacks followed in 1867. Consistent with its policy of providing educational opportunities for freedmen, Congress, in 1867, incorporated Howard University. 14 Stat. 438 (1867). Further Congressional activity in 1867 evidences interest in special assistance to Blacks: (1) "A Resolution for the Relief of Freedmen or Destitute Colored People in the District of

Columbia" stated that fifteen thousand dollars be, and the same is hereby, appropriated, out of any money in the treasury not otherwise appropriated, for the relief of freedmen or destitute colored people in the District of Columbia, the same to be expended under the direction of the Commissioner of the Bureau of Freedmen and Refugees. (15 Stat. at L., 20, 1867.) (2) "[T]he Bureau allotted $407,752.21 to twenty institutions of higher learning for Negroes while $3,000 was given to a school for loyal refugees." (G. Bentley, *History of the Freedmen's Bureau* (1974), p. 179.)

It was not the intent of the Congress that Howard be an institution of higher learning exclusively for the benefit of the freedmen; it was open to all. Section One of the Charter stipulated that Howard be a 'University for the education of youth in the liberal arts and sciences". Nevertheless, while "Howard's Charter provided for the 'education of youth', it can hardly be denied that the founders expected a sizable number of the students to be Negroes. Howard was thus unique because it also planned the education of a sizable number of Negro men and women and white men and women." Howard could be properly viewed, by 1870, as a "predominately Negro Univ[illegible]". Rayford W. Logan, *Howard University, The First Hundred Years, 1867-1967* (New York, 1969), 25-26.

By 1870, some members of Congress were raising questions about the propriety of Commissioner Howard's expenditure of Bureau funds on Howard. The Committee on Education and Labor presided over the hearing which heard testimony concerning the authority of the Bureau to expend its education funds on Howard University.

In response to a charge that Gen. O. O. Howard, Commissioner of the Freedmen's Bureau, acted improperly the committee stated:

> "If one of the very purposes of the Bureau was to *educate freedmen*, and if the university was estab-

lished for that purpose, the expenditure was not improper. The reports of the general school superintendent of the Bureau which were put in evidence, show clearly that the great and earnest effort of the commissioner was to inaugurate a system of common school education among the freedmen. A necessary adjunct and indispensible condition precedent to this plan was to establish a university that could give life and energy to these widely scattered schools. The necessity of preparing and qualifying teachers for future use among the freedmen justifies the expenditure." House Report No. 121 (July 15, 1870).

Here again Congress rebuffed challengers to its intention and developed policy to provide special assistance and opportunities for the Negro. By dismissing the charges against Gen. Howard on the above mentioned grounds, Congress reaffirmed its commitment to the education of the Negro. This commitment is further evidenced by the fact "that between 1879 and 1925, the Federal Treasury appropriated over four million dollars" to Howard University, despite the fact that federal appropriations were not specifically required or authorized by the Act of Incorporation.

Congressional policy with respect to education of Blacks is explicit in the language of the Committee on Education in its January 1926 Report which accompanied House Bill 8466, an Act to amend section 8 of the original Act of Incorporation of Howard University.

> The Committee on Education, to which was referred H.R. 8466, a bill to amend Section 8 an act entitled 'An Act to Incorporate the Howard University in the District of Columbia,' approved March 2, 1867, by authorizing Federal appropriations to aid in the construction, development, improvement, and maintenance of said university, having considered said bill, reports favorable thereon with the recommendation that the bill does pass as introduced.

> Howard University was incorporated under the act of March 2, 1867. The first Federal appropriation for its aid was granted March 3, 1879. From that date the Federal Government has annually contributed to the construction maintenance, and development of the institution, $221,000 being the largest amount appropriated for maintenance in any one year. Since the establishment of the Budget System, however, and the consolidation of all jurisdiction over appropriations in one committee of the House, items recommended by the Budget and approved by the Committee on Appropriations have frequently been stricken out in the House on the point of order that such appropriations are not authorized by existing law. The purpose of this bill is to authorize such appropriations for the maintenance, development, improvement, and construction of Howard University as Congress may annually desire to make.

Apart from the precedent established by 45 years of congressional action, the committee feels that Federal aid to Howard University is fully justified by the national importance of the Negro problem. For many years past it has been felt that the American people owed an obligation to the Indian, whom they dispossessed of this land, and annual appropriations of sizable amounts have been passed by Congress in fulfillment of this obligation. The obligation in favor of the Negro race would seem to be even stronger than in the case of the Indian.[9] The Negro was not robbed of his land as was the Indian, but he was seized by force and brought unwillingly to a strange country, where for generations he was the slave of the white man, and where, as a race, he has since been compelled to eke out a meager and precarious existence.

Moreover, financial aid has been and still is extended by the Federal Government to the so-called land-grant colleges of the various States. While it is true that ne-

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[9] See this Court's approval of preferential treatment of descendants of the American Indian. *Morton* v. *Mancari*, 417 U.S. 535 (1974).

grow [sic] may be admitted to these colleges, the conditions of admission are very much restricted, and generally it may be said that these colleges are not at all available to the negrow, [sic] except for agricultural and industrial education. This is particularly so in the professional medical schools, so that the only class a school in America for training colored doctors, dentists, and pharmacists is Howard University, it being the only place where complete clinical work can be secured by the colored student.

There is furthermore a strong practical reason why a school like Howard University should be maintained in the District of Columbia. The Freedmen's Hospital was authorized by Congress in 1904, and was built upon land owned by Howard University. The university generously leased the land to the Federal Government for 99 years, at $1 a year, with a privilege of renewal for a like period. The existence of this hospital so near to the medical school of Howard University affords the students of the university an opportunity which exists nowhere else in this country to acquire the clinical course. On the other hand, this opportunity exists for white students in every State of the Union.

> In addition to the great importance to the country of having an institution capable of developing trained leaders for the colored race in all walks of life, the urgent necessity of making possible a supply of properly trained phvsicians of that race for the protection of the health of all our people, white as well as black, must be plain to every fair-minded American citizen. House Report No. 121 45 Stat. 1021 (1928).

The minority report, which also accompanied Bill H.R. 8466 to the floor presented opposing arguments based upon an interpretation of legality and constitutionality, widely at variance with the majority positions. *Id.*

This reasoning was not persuasive. The majority prevailed and the House passed the Act providing statutory authorization for future federal appropriations to Howard University. An Act to amend section 8 of an Act entitled "An Act to incorporate the Howard University in the District of Columbia", provided that:

> "Annual appropriations are hereby authorized to aid in the construction, development, improvement, and maintenance of the university, no part of which shall be used for religious instruction. The university shall at all times be open to inspection by the Bureau of Education and shall be inspected by the said Bureau at least once each year. An annual report making a full exhibit of the affairs of the university shall be presented to Congress each year in the report of the Bureau of Education."

It is not arguable that an examination of the relationships between Blacks and the Federal Government after 1870 reveals abandonment of Black protection and the institutionalization of racist practices such as separate and unequal treatment. Furthermore, a specific survey of the Federal Government's policy with respect to Black education demonstrates a mixed response to the Black American's call for equal education opportunities. Frequently ameliorative measures for the education of the general populace failed to stipulate sanctions against racially biased implementation of Congressional directives. Nevertheless, there is Congressional activity from 1863 to 1870 and 1926 to 1928 which reflects a disposition to assist Blacks suffering under disabilities occasioned by a previous condition of servitude and race. Specific measures in regard to freedmen's relief and education, 1863-1870 and Howard University, 1867-1928 together constitutes a parallel developing policy of educational opportunities for Blacks and affirmative action toward the broadening of such opportunities.

Dr. Tollett states the legal basis in support of preferential treatment:

"Three major overlapping and interrelated constitutional arguments can be made in support of preferential admissions. First, the Civil War Amendments and Reconstruction Civil Rights Acts when construed together and structurally lead to the conclusion that they were adopted and enacted primarily for the benefit of other discrete insular disadvantaged minorities similarly situated as Blacks; and they can be used formally and incidentally for the benefit of any group subjected to invidious discrimination. The primary and secondary purposes of these laws, thus, not only prohibit discrimination against these groups, but also impose an affirmative duty upon the states to establish and secure equity and justice to these groups. The primary and secondary purposes take priority over the formal and incidental purposes of these laws." Tollet, "Present Context of Graduate Education and Potential Impact on Minority Participation" (Unpublished); Spring, 1975.

In analyzing the plight of the American of African descent, one may attempt to compare his trials and tribulations with those of immigrants of European descent. *Bakke*, 553 P.2d 1153, 1163, n. 16. However to even so much as speak of comparing two such groups so diametrically opposed in terms of experiences, struggles, and means of adapting to this country and its practices, is absolutely absurd!

The manner in which these two groups of people were brought into this country is the most distinguishing point of reference that should be dealt with. The black person came to America as a slave, forced to live in this country in human bondage, forced to live in this country as human property. . . . Yet the indignity with which blacks were treated did not stop at such an apparently inhumane practice. The government of this country further endorsed the moral degradation of once historically proud people, by setting forth in its Constitution a provision clearly stating that the slave, i.e., the black person, was to be considered three-fifths of a person. One would think that this was the

epitome of demoralization, yet more was in store.... In some cases black persons in this country were encouraged to lose sight and hope of establishing any type of family ties, since it was not an uncommon practice to separate a mother from her loved ones or to bring together a black man and black woman for the purpose of procreating more suffering humans, a practice equated with that of breeding cattle. The black person in this country was not ony deprived of an education in which he would be able to learn to count basic numbers and write his own signature, but he was deprived of a more fundamental means of education—the ability to read. Hence, this country further endorsed the manner of keeping the black person ignorant, so ignorant that he knew of no other life beyond his visual scope, so ignorant that he was oftentimes drained of the very desire to learn and explore the possibility of another kind of life. That may have been beneficial to him, however, since he was not allowed to travel freely, or even speak freely, without the risk of severe punishment, even death.

On the other hand, the immigrant of European descent never experienced such treatment or any reasonable facsimile to such; that much is certain . . . no more need be said. Marcus Lee Hansen, *The Immigrant in American History* (1940).

This Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), outlawed racial classification by the state in affording educational facilities. As a result of this decision the process of education in this country began to move from that of dual systems to unitary systems. In the process of desegregation—for remedying past effects of racial discrimination—race has been used as an affirmative factor. As the progeny of *Brown*, *supra*, spread from the field of education to all endeavors of activity of the State so did the use of race as an affirmative factor in attacking racial discrimination in the fields of housing, employment, voting, and other areas. As Senator Edward Brooke has stated:

"And let there be no doubt that there are ample Congressional Precedents for special categorical programs which consider age, race, socio-economic conditions and education deficiencies in allocating federal resources. And there are specially targeted educational programs like the Trio programs and those contained in Title IX of the Higher Education Act. Special Bills to help the handicapped have also received great attention and support.

"Recently, there have been efforts by the Congress to turn away from the categorical funding concept. But, as ranking minority member on the Labor-HEW Subcommittee of the Senate Appropriations Committee, I see again and again recognition that many segments of our society have debilitating problems which will remain insoluble without intensive and particularized aid. And, there is often a realization that, when left to their own devices, federal and state agencies or private institutions with substantial federal support, will not be sensitive or responsive to the needs of the poor, the disenfranchised or the disadvantaged." Edward Brooke, U.S. Senator from Massachusetts, National Conference on the "Crisis in Affirmative Action" at the Georgetown Law Center, Washington, D.C., May 25, 1977.

America's moral dilemma has raised the stark constitutional issue of whether racial classifications may be used for "benign purposes". Stated another way—may the State single out racial minorities for favorable treatment, for remedial, compensatory, or similar purposes?

As the late President Lyndon B. Johnson emphasized at the Civil Rights Symposium at the dedication of the Lyndon Baines Johnson Library, in Austin, Texas, December, 1972:

> "[W]e cannot obscure this blunt fact, the black problem remains what it has always been, the simple problem of being black in a white society. That is the problem to which our efforts have been addressed. To be black in a white society is not to stand on level and equal ground. While the races may stand side by side, whites stand on history's mountain and blacks stand in history's hollow. Until we overcome unequal history, we cannot overcome unequal opportunity."

Amici desires the court to recognize what the *Brown* decision sought to achieve in this society and what has not come to be; that is, the full recognition by the dominant race that because of segregation of the past and all of its ugly "psychological accouterments", black people remain behind today in the republic solely on the basis of race. The *Brown* decision and its progeny have been painfully waged by people of goodwill, both black and white, in attempts to achieve the full promise of *Brown*. The court has had a sufficient number of cases before it in these past twenty-three years to be disabled to claim ignorance of the plight of black people in this society seeking to catch up to their rightful place in a society that plundered their being. Stated differently, *Brown* represents the rebirth [See Slaughter-House Cases, 16 Wall. 36, 67-72 (1873).] of a legalism: that Black people have a legal existence in this constitutional democracy. The position that we take here in *Bakke* represents a restatement of a truism: that the same Fourteenth Amendment which recognized our legal existence announced in *Brown* protects black people from claims of reverse discrimniation based on the implementation of affirmative action programs.

The basis of *Bakke's* claim is that he should be treated equally; that the affirmative action program of petitioner discriminated against him because it admitted black students whose test scores were less attractive than his own; that the admission of black students caused his rejection and negated his aspiration to possibly participate in the society as a medical doctor. Amici reminds this court that this republic could have concurred in this very claim had it adopted the argument *Bakke* now raises in *Dred Scott*

v. *Sanford,* 19 How. 393 (1857). (See especially, Wayne Associate Justice, concurring in *Dred Scott* at 454.) Since the Court chose not to allow black people to "become a member of the political community formed and brought into existence by the Constitution . . . or to be entitled to all the rights, privileges, and immunities, guaranteed by that instrument . . ." the black American aborted, unwatered above the ground in an unfree society while the roots of his free white brothers dug down deep into the earth capturing all the moisture, allowing them to take, expand and to receive every advantage offered by the society. *Id.* at 403.

Amici does not fault *Bakke* for his claim. We do not, however, believe that this Court will allow the judicially created preference that it gave to white people between *Dred Scott* and *Plessey* (38 years) and from *Plessey* to *Brown* (59 years) causing black people to remain in a judicially created second-class citizenship status for 97 years, to be repeated here by undermining affirmative action programs. The Court had an opportunity to make this a color blind society as a matter of law in *Plessey;* to make race a neutral factor in a democratic state. It chose not to do so, and now it should allow black people in this society to catch up under constitutionally protected affirmative action programs as mandated by the Thirteenth and Fourteenth Amendments.

The stark issue ultimately revealed by this instant appeal is whether the majority shall have more advantage because of their advantaged position. Bakke is in fact asking for more advantage: that whites be given the one hundred (100) seats so as to include him. Had the sixteen (16) seats been assigned to veterans, a preference designed because the veteran had not only served his country but had been discommoded and excluded from the mainstream for a period of time, Bakke's complaint would be that the non-veteran white majority's rights had been infringed upon. Bakke's complaint is that more white majority applicants should have been admitted, thus perpetuating the white advantage over other minorities in a program state supported by all the residents.

Can California perpetuate a system of education whose burden is borne by all its residents which perpetually enhances the advantages of its white majority to the superior societal benefits? Can this be done under the pretext that the Fourteenth Amendment to the Constitution, though intended to provide equality to the newly freed slaves and their descendants, commands this permanent inequality? *Amici think not. They do not believe that the Constitution mandates a state of inequality in perpetuity for Black Americans.*

Mr. Justice Stewart cited with approval in his concurring opinion in *Lau* v. *Nichols,* 414 U.S. 563, 569, (1974), the following language:

> "Senator Humphrey, during the floor debates on the Civil Rights Acts of 1964, said: 'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.' "

CONCLUSION

This Court should not impose a constitutional requirement prohibiting the University of California, Davis, Medical School from using race, along with other factors in selecting students for admissions. Race should meet constitutional requirements when properly utilized as a part of an over-all admissions system.

The judgment below should be reversed.

Respectfully submitted,

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J. CLAY SMITH, JR.

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June 6, 1977

ON BRIEF
GENNA RAE MCNEIL, Ph.D.
MICHAEL R. WINSTON, Ph.D.
HERSCHELLE REED
Student Assistants
ROBERT L. BELL
TAMARA D. HARRIS
CAROLYN F. SMITH
ESZART A. WYNTERS
ALBERT S. HARRIS, JR.
ROBERT H. THOMPSON

APPENDIX

APPENDIX "A"

HISTORICALLY BLACK, JUNIOR, FOUR YEAR GRADUATE AND PROFESSIONAL INSTITUTIONS

ALABAMA (13)		
Alabama A & M University	Normal, Alabama 35762	Dr. R. D. Morrison
Alabama Lutheran Academy	1804 Green Street Selma, Alabama 36701	Dr. Willis L. Wright
Alabama State University	1100 S. Jackson Street Montgomery, Alabama 36101	Dr. Levi Watkins
Bishop State Jr. College	Mobile, Alabama 36603	Dr. S. D. Bishop
Daniel Payne College	6415 Washington Boulevard Birmingham, Alabama 35212	Dr. James Luther Myers
Lawson State Community College	3060 Wilson Road Birmingham, Alabama 35221	Dr. Leon Kennedy
Lomax-Hannon College	South Conecuh Street Greenville, Alabama 36037	Rev. C. M. Smith
Miles College	Birmingham, Alabama 35064	Dr. W. Clyde Williams
Oakwood College	Huntsville, Alabama 35806	Dr. Calvin B. Rock
Selma University	1501 Lapsley Street Selma, Alabama 36701	Dr. M. C. Cleveland, Jr.

Stillman College	P. O. Box 1430 Tuscaloosa, Alabama 35491	Dr. Harold N. Stinson
Talladega College	627 W. Battle Street Talladega, Alabama 35160	Dr. Aaron Brown Interim President
Tuskegee Institute	Tuskegee, Alabama 36088	Dr. Luther H. Foster
Arkansas Baptist College	1600 High Street Little Rock, Arkansas 72202	Attorney J. C. Oliver
Philander Smith College	812 West 13th Street Little Rock, Arkansas 72203	Dr. Walter R. Hazzard
Shorter College	604 Locust Street Little Rock, Arkansas 72114	Dr. Olney L. Griffin
University of Arkansas (Pine Bluff)	North Cedar Street Pine Bluff, Arkansas 71601	Dr. Herman Smith (Chancellor)
DELAWARE (1)		
Delaware State College	Dover, Delaware 19901	Dr. Luna I. Mishoe
DISTRICT OF COLUMBIA (4)		
D. C. Teachers College	11th & Harvard Streets, N.W. Washington, D.C. 20009	Dr. Wendell Russell
Federal City College	1420 New York Ave. N.W. Washington, D. C. 20005	Dr. Wendell Russell

Howard University	2400 - 6th Street, N.W. Washington, D. C. 20001	Dr. James Cheek
Washington Technical Institute	4100 Connecticut Avenue, N.W. Washington, D. C. 20008	Dr. Cleveland L. Dennard
FLORIDA (4)		
Bethune-Cookman College	640 Second Avenue Daytona Beach, Florida 32015	Dr. Oswald Bronson
Edward Waters College	1658 Kings Road Jackson, Florida 32209	Dr. Cecil Cone
Florida A & M University	Tallahassee South Boulevard Tallahassee, Florida 32307	Dr. Benjamin L. Perry
Florida Memorial College	Miami, Florida 33054	Dr. W. C. Robinson
GEORGIA (10)		
Albany State College	Hazard Drive Albany, Georgia 31705	Dr. Charles L. Hayes
Atlanta University	223 Chestnut Street, S.W. Atlanta, Georgia 30314	Dr. Thomas D. Jarrett
Clark College	240 Chestnut Street, S.W. Atlanta, Georgia 30314	Dr. Charles L. Knight Acting President
Fort Valley State College	South Macon Street Fort Valley, Georgia 31030	Dr. Cleveland Pettigrew

Interdenominational Theological Center	Atlanta, Georgia 30314	Dr. Grant E. Shockley
Morehouse College	223 Chestnut Street, S.W. Atlanta, Georgia 30314	Dr. Hugh M. Gloster
Morris Brown College	643 Hunter Street, N.W. Atlanta, Georgia 31314	Dr. Robert Threatt
Paine College	1235 Fifteenth Street Augusta, Georgia 30901	Dr. Julius S. Scott, Jr.
Savannah State College	State College Branch Savannah, Georgia 31400	Dr. Prince Jackson
Spelman College	350 Leonard Street, S.W. Atlanta, Georgia 30314	Dr. Donald Stewart
KENTUCKY (2)		
Kentucky State University	East Main Street Frankfort, Kentucky 40601	Dr. William A. Butts
Simmons University	1811 Dumesnell Street Louisville, Kentucky 40210	Dr. William L. Holmes
LOUISIANA (4)		
Dillard University	2601 Gentilly Boulevard New Orleans, Louisiana 70122	Dr. Samuel DuBois Cook
Grambling University	Grambling, Louisiana 71245	Dr. Ralph W. E. Jones
Southern University (1)	Baton Rouge, Louisiana 70813	Dr. Jesse Stone
Southern University (2)	6400 Press Drive New Orleans, Louisiana 70813	
Southern University (3)	Shreveport, Louisiana	
Xavier University	7325 Palmetto Street New Orleans, Louisiana 70125	Dr. Norman Francis
MARYLAND (4)		
Bowie State College	Jericho Park Road Bowie, Maryland 20715	Dr. Samuel L. Myers
Coppin State College	2500 West North Avenue Baltimore, Maryland 21216	Dr. Calvin Burnett
Morgan State University	Cole Spring Lane & Hillen Road Baltimore, Maryland 21212	Dr. Andrew Billingsley, Jr.
University of Maryland Eastern Shore	Princess Ann, Maryland	Dr. William P. Hytche (Chancellor)
MICHIGAN (1)		
Shaw College at Detroit	7351 Woodward Avenue Detroit, Michigan 48202	Dr. Romallus O. Murphy

MISSISSIPPI (12)		
Alcorn State University	Rural Station Lorman, Mississippi 39096	Dr. Walter Washington
Coahoma Jr. College	R.I. Box 616 Clarksdale, Mississippi 38614	Dr. James E. Miller
Jackson State University	1325 Lynch Street Jackson, Mississippi 39217	Dr. John A. Peoples, Jr.
Mary Holmes College	Post Office Box 336 West Point, Mississippi 39773	Dr. Joseph Gore
Mississippi Industrial College	Holly Springs, Mississippi 38635	Dr. E. E. Rankin
Mississippi Valley State University	Itta Bena, Mississippi 38941	Dr. E. A. Boykins
Natchez Jr. College	1010 Ext. N. Union Natchez, Mississippi 39120	Dr. McKinley K. Nelson
Prentiss Normal & Industrial Institute	Prentiss, Mississippi 39474	Mr. A. L. Johnson
Rust College	Rust Avenue Holly Springs, Mississippi 38635	Dr. W. A. McMillan
Saints Jr. College	Post Office Box 419 Lexington, Mississippi 39095	Mrs. Arenia M. King
Tougaloo College	Tougaloo, Mississippi 39175	Dr. George A. Owens
Utica Jr. College	Utica, Mississippi 39175	Dr. J. Louis Stokes
MISSOURI (1)		
Lincoln University	Jefferson City, Missouri 65101	Dr. James Frank
NORTH CAROLINA (12)		
Barber-Scotia College	Cabarrus Avenue Concord, North Carolina 28025	Mrs. Mable P. McLean
Bennett College	Washington Street Greensboro, North Carolina 27402	Dr. Isaac H. Miller
Elizabeth City State University	Elizabeth City, North Carolina 27909	Dr. Marion D. Thorpe (Chancellor)
Fayetteville State University	Fayetteville, North Carolina 28301	Dr. Charles A. Lyons, Jr. (Chancellor)
Johnson C. Smith University	100 Beattiesford Road Charlotte, North Carolina 28208	Dr. Wilbert Greenfield
Livingstone College	701 W. Monroe Street Salisbury, North Carolina 28144	Dr. F. George Shipman
N. C. A&T State University	312 N. Dudley Street Greensboro, North Carolina 27411	Dr. Lewis C. Dowdy (Chancellor)
North Carolina Central University	Fayetteville Street Durham, North Carolina 27707	Dr. Albert N. Whiting (Chancellor)

Shaw University	118 E. South Street Raleigh, North Carolina 27602	Dr. Richard L. Fields Acting President
St. Augustine's College	1315 Oakwood Avenue Raleigh, North Carolina 27602	Dr. Prezell R. Robinson
Winston-Salem State University	Winston-Salem, North Carolina 27102	Dr. Kenneth R. Williams (Chancellor)
OHIO (2)		
Central State University	Wilberforce, Ohio 45384	Dr. Lionel Newsom
Wilberforce University	Wilberforce, Ohio 45384	Dr. Charles E. Taylor
OKLAHOMA (1)		
Langston University	Langston, Oklahoma 73050	Dr. Thomas E. English
PENNSYLVANIA (2)		
Cheyney State College	Cheyney, Pennsylvania 19319	Dr. Wade Wilson
Lincoln University	Lincoln University, Pa. 19352	Dr. Herman R. Branson
SOUTH CAROLINA (8)		
Allen University	1530 Harden Street Columbia, South Carolina 29204	Dr. W. G. Nichols Interim President

Benedict College	Harden & Blanding Streets Columbia, South Carolina 29204	Dr. Henry Ponder
Claflin College	College Avenue Orangeburg, South Carolina 29115	Dr. H. V. Manning
Clinton Jr. College	Rock Hill, South Carolina	Dr. Sallie V. Moreland
Friendship Jr. College	Allen Street Rock Hill, South Carolina 29732	Dr. Spofford L. Evans
Morris College	North Main Street Sumter, South Carolina 29150	Dr. Luns C. Richardson
South Carolina State College	Orangeburg, South Carolina 29115	Dr. M. Maceo Nance, Jr.
Voorhees College	Denmark, South Carolina 29042	Dr. Harry Graham
TENNESSEE (7)		
Fisk University	17th Avenue, North Nashville, Tennessee 37203	Dr. Walter Leonard
Knoxville College	901 College Street Knoxville, Tennessee 37921	Dr. Rutherford H. Adkins
Lane College	501 Lane Avenue Jackson, Tennessee 38301	Dr. Herman Stone
LeMoyne-Owen College	807 Walker Avenue Memphis, Tennessee 38126	Dr. Walter L. Walker

Meharry Medical School	1005 - 18th Avenue, North Nashville, Tennessee 37208	Dr. Lloyd C. Elam
Morristown College	Morristown, Tennessee 37814	Dr. Raymon E. White
Tennessee State University	3500 Centennial Boulevard Nashville, Tennessee 37203	Dr. Frederick Humphries
TEXAS (9)		
Bishop College	3837 Simpson-Stuart Road Dallas, Texas 75241	Dr. Milton K. Curry
Huston-Tillotson College	1820 E. 8th Street Austin, Texas 78702	Dr. John T. King
Jarvis Christian College	U. S. Highway 80 Hawkins, Texas 75765	Dr. E. W. Rand
Paul Quinn College	1020 Elm Street Waco, Texas 76703	Dr. Reuben D. Manning
Prairie View A & M University	Prairie View, Texas 77445	Dr. A. I. Thomas
Southwestern Christian College	Post Office Box 10 Terrell, Texas 75160	Dr. Jack Evans
Texas College	2404 North Grand Avenue Tyler, Texas 75703	Dr. Allen C. Hancock
Texas Southern University	3201 Wheeler Avenue Houston, Texas 77004	Dr. Granville Sawyer

10a

Wiley College	711 Rosborough Spring Road Marshall, Texas 75670	Rev. Robert Hayes
VIRGINIA (6)		
Hampton Institute	East Queen Street Hampton, Virginia 23368	Dr. Carl M. Hill
Norfolk State College	2401 Corprew Avenue Norfolk, Virginia 23504	Dr. Harrison B. Wilson
St. Paul's College	Lawrenceville, Virginia 23868	Dr. James A. Russell, Jr.
The Virginia College	Garfield Ave. & Dewitt Street	Dr. M. C. Southerland
Virginia State College	Petersburg, Virginia 23803	Dr. Thomas Law
Virginia Union University	1500 N. Lombardy Street Richmond, Virginia 23220	Dr. Allix B. James

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APPENDIX "B"

TABLE I.*

EXTENT OF ELEMENTARY SCHOOL SEGREGATION IN 75 SCHOOL SYSTEMS (ONLY CALIFORNIA SCHOOLS CITED)

	Percentage of Negroes in 90 to 100 Percent Negro Schools	Percentage of Negroes in Majority Negro Schools	Percentage of Whites in 90 to 100 Percent White Schools
Los Angeles, California	39.5	87.5	94.7
Oakland, California	48.7	83.2	50.2
Pasadena, California	None	71.4	82.1
Richmond, California	39.2	82.9	90.1
San Diego, California	13.9	73.3	88.7
San Francisco, California	21.1	72.3	65.1

* Data based upon Report of the United States Commission On Civil Rights (1967) Racial Isolation in the Public Schools.

APPENDIX "C"

For Press Conference to Announce: *Minorities in Medicine: From Receptive Passivity to Positive Action, 1966-1976* by Charles E. Odegaard, Ph.D.

Waldorf-Astoria Hotel
Duke of Windsor Room
301 Park Avenue
New York City
May 9, 1977

TABLE 1

SELECTED MINORITY GROUP ENROLLMENT IN FIRST-YEAR CLASSES IN U.S. MEDICAL SCHOOLS (1968-1976)

	Black American *		American Indian		Mexican American		Mainland Puerto Rican		Total Selected Minority Group		Total First-Year Enrollment
	Number Enrolled	% of Total Enrollment	Number Enrolled	% of Total Enrollment	Number Enrolled	% of Total Enrollment	Number Enrolled	% of Total Enrollment	Number Enrolled	% of Total Enrollment	
1968-69	266	2.7	3	0.03	20	0.2	3	0.03	292	2.9	9,863
1969-70	440	4.2	7	0.1	44	0.4	10	0.1	501	4.8	10,422
1970-71	697	6.1	11	0.1	73	0.6	27	0.2	808	7.1	11,348
1971-72	882	7.1	23	0.2	118	1.0	40	0.3	1,063	8.5	12,361
1972-73	957	7.0	34	0.3	137	1.0	44	0.3	1,172	8.6	13,677
1973-74	1,023	7.5	44	0.3	174	1.2	56	0.4	1,297	9.1	14,124
1974-75	1,106	7.5	71	0.5	227	1.5	69	0.5	1,473	10.1	14,763
1975-76	1,036	6.8	60	0.4	224	1.5	71	0.5	1,391	9.1	15,295
1976-77	1,040	6.7	43	0.3	245	1.6	72	0.5	1,400	9.0	15,613

* Black Americans at Howard and Meharry medical schools accounted for 120 of these 1969-70 freshmen and 195 of these 1974-75 freshmen.

Source: AAMC enrollment data.

For Press Conference to Announce: *Minorities in Medicine: From Receptive Passivity to Positive Action, 1966-76* by Charles E. Odegaard, Ph.D.

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TABLE 2

APPLICANTS TO FIRST-YEAR CLASSES IN U.S. MEDICAL SCHOOLS
(1970-76)

	Black American	American Indian	Mexican American	Mainland Puerto Rican	Total Number of Minority Group Applicants	Total Number of Applicants
1970-71	1,250					24,987
1971-72	1,552					29,172
1972-73	2,382					36,135
*1973-74	2,227	240	349	233	3,049	40,506
1974-75	2,368	131	437	170	3,106	42,624
1975-76	2,286	128	434	204	3,052	42,303
1976-77	2,486	123	452	209	3,270	42,155

* Data for American Indians, Mexican Americans, and Mainland Puerto Ricans was not collected prior to 1973.

Source: AAMC and *The Journal of The American Medical Association*, December 27, 1976, Volume 236, No. 26, Index Issue, p. 2961, Table 8.

For Press Conference to Announce: *Minorities in Medicine: From Receptive Passivity to Positive Action, 1966-76* by Charles E. Odegaard, Ph.D.

Waldorf-Astoria Hotel
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TABLE 3

PERCENT OF APPLICANTS ACCEPTED TO MEDICAL SCHOOL FOR SELECTED YEARS

	% of All Students Accepted	% of Black Students Accepted
1971-72	42.3	52.2
1972-73	38.1	36.0
1975-76	36.3	41.3
1976-77	37.4	39.1

Source: AAMC (data for American Indians, Mexican Americans, and Mainland Puerto Ricans was not available at the time this was obtained)

TABLE 15.—STUDENTS REPEATING THE ACADEMIC YEAR 1975-1976

	First-Year Class			All Other Classes		
		Repeating			Repeating	
	Enrolled Total	No.	%	Enrolled Total	No.	%
Afro-American	1,052	159	15.1	3,436	140	5.7
American Indian	61	4	6.6	115	6	5.2
Mexican American	228	21	9.2	490	26	5.3
Puerto Rican (mainland)	78	8	10.3	135	9	6.7
All other students	13,808	157	1.1	37,406	262	0.7

TABLE IV.—RATIO OF MEDMAR (1976) IN STATE TO MINORITY POPULATION (1970 CENSUS) IN THAT STATE

Rank	State	(a) Minority Population	(b) # in MedMAR	b/a x 10⁵
1	New Mexico	210,356	61	29.0
2	Massachusetts	204,732	46	22.5
3	District of Columbia	540,823	121	22.4
4	Colorado	179,359	37	20.6
5	Hawaii	20,377	4	19.7
6	Minnesota	68,130	13	19.1
7	Maine*	5,416	1	18.5
8	Michigan	1,078,206	189	17.5
9	Tennessee	625,596	103	16.5
10	Maryland	714,185	116	16.2
11	Utah	32,084	5	15.6
12	Montana*	32,262	5	15.5
13	Nevada	45,257	7	15.5
14	Nebraska	58,951	9	15.3
15	Connecticut	223,229	32	14.3
16	Oklahoma	283,254	39	13.8
17	Pennsylvania	1,075,967	145	13.5
18	New Jersey	918,739	122	13.3
19	New York	3,128,673	401	12.8
20	Illinois	1,680,533	211	12.6
21	California	3,394,957	425	12.5
22	Missouri	500,358	61	12.2
23	Oregon	51,209	6	11.7
24	Iowa	43,371	5	11.5

TABLE 24.—STUDENTS ADMITTED 1973-1974 THROUGH 1975-1976 AND STILL IN MEDICAL SCHOOL OR GRADUATED JUNE 1976

	Admitted 1973-1974	Retained June 1975 No.	%	Admitted 1974-75	Retained June 1976 No.	%	Admitted 1975-1976	Retained June 1976 No.	%
Afro-American	935	817	87	1,001	919	92	905	854	94
American Indian	38	34	89	67	58	87	57	54	95
Mexican American	174	153	88	209	200	96	194	188	97
Puerto Rican (mainland)	51	50	98	65	62	95	72	69	96
All other students	12,633	12,272	97	13,211	12,988	98	13,776	13,538	98

25	Kansas	144,262	16	11.1
26	Wisconsin	172,420	19	11.0
27	Ohio	1,023,378	109	10.7
28	Mississippi	820,861	87	10.6
29	North Carolina	1,177,655	123	10.4
30	West Virginia	68,446	7	10.2
31	Texas	3,038,923	310	10.2
32	Alabama	907,592	92	10.1
33	Virginia	875,215	86	9.8
34	Indiana	398,987	38	9.5
35	Louisiana	1,099,469	98	8.9
36	Georgia	1,195,798	106	8.9
37	South Carolina	794,446	69	8.7
38	Delaware*	81,886	7	8.5
39	Florida	1,097,393	86	7.8
40	Arizona	387,966	29	7.5